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~~1277~~ No. 3585

1278

United States
Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN TRADING COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

A. T. STEELE,

Defendant in Error.

Transcript of Record.


Upon Writ of Error to the United States Court
for China.

FILED

DEC 1 - 1920

F. D. MONKTON,

CLERK



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United States
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN TRADING COMPANY, a Corpora-
tion,

Plaintiff in Error,

VS.

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In the United States Court for China.

CIVIL JURISDICTION.

Cause No. 798.

Civil No. 272.

A. T. STEELE

VS.

AMERICAN TRADING CO.

Complaint.

The plaintiff complains to this Honorable Court, and for cause of action alleges:

1. That the plaintiff is an American citizen, and the defendant is an American corporation with offices in the city of Shanghai, China, within the jurisdiction of this Honorable Court.

2. By an instrument in writing dated the 27th day of May, 1918, the defendant corporation employed the plaintiff as chief accountant in their Shanghai office for a term of three years, and the plaintiff was to receive for the said period no less than ten thousand gold dollars (\$10,000) for his services. A copy of the said document [1*] is attached hereto and made part hereof as Exhibit "A."

3. That the defendant corporation agreed to pay the plaintiff the aforesaid ten thousand gold dollars (\$10,000) at an exchange rate of fifty-five gold cents to the tael, and seventy-two tael cents to the dollar Mexican (\$1.00). That at the said exchange rate

*Page-number appearing at foot of page of original certified Transcript of Record.

ten thousand gold dollars (\$10,000) are equal to twenty-five thousand two hundred and eighty Mexican dollars (25,280).

4. That among other things, the defendant corporation agreed and promised the plaintiff, and it is the custom, practice and rule of the defendant corporation to allow to its executives and covenanted employees the various amounts, moneys, bonuses, commissions and remuneration set out in Exhibit "B," and the plaintiff is entitled to and should be paid the same.

5. That the defendant corporation wrongfully, improperly and without cause or reason on or about March 17th, 1919, dismissed and discharged the plaintiff, and thereby the defendant has willfully broken the aforesaid agreement and has refused to complete and carry out the said contract, to the plaintiff's great damage. [2]

6. That demand has been made, but the defendant corporation has failed, neglected, and refused, and still fails, neglects and refuses, to pay to the plaintiff the various amounts: Salary, bonus, commission, remuneration and expenses due to the said plaintiff, in accordance with the understanding and agreement made by and between the parties hereto, when the plaintiff accepted employment with the defendant corporation.

WHEREFORE; The plaintiff claims: (a) Thirty-two thousand and seventy-five $36/100$ Mexican dollars (\$32,075.36), as set out in Exhibit "B." (b) For costs of this suit and such other and further relief as this Honorable Court may deem just.

Dated Shanghai, China, July 3d, 1919.

H. D. RODGER,
Attorney for the Plaintiff.

Filed July 3, 1919. (Sgd.) William A. Chapman, Deputy Clerk. [3]

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Shanghai,—ss.

VERIFICATION.

Hewitt Douglass Rodger, being duly sworn on behalf of the plaintiff in the above-entitled action, says that he has read the foregoing complaint, and knows the contents thereof, that he has a signed statement from the said plaintiff setting out the facts of this case, and the matters complained of and he verily believes the same to be true; that the plaintiff is absent from this district, where his counsel resides, and that the affiant is the plaintiff's attorney, and therefore makes this affidavit.

(Sgd.) H. D. RODGER,
Attorney for the Plaintiff.

Subscribed and sworn to before me, at Shanghai, China, this 3d day of July, 1919.

(Sgd.) WILLIAM A. CHAPMAN,
Deputy Clerk. [4]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE,

Plaintiff,

vs.

AMERICAN TRADING COMPANY,

Defendant.

Plea in Abatement.

Now comes the defendant and respectfully shows to this Honorable Court:

1st. That the contract referred to in allegation 2 of the plaintiff's petition and marked Exhibit "A" was entered into by and between the plaintiff herein and The American Trading Company (Pacific Coast) which said company is duly organized, created and existing by virtue of the laws of the State of California, United States of America.

2d. That the defendant company was organized, ~~created and is existing~~ solely by virtue of the laws of the State of New York and is an entirely separate and distinct company from the American Trading Company (Pacific Coast).

3d. That the defendant company has never entered into any contract whatsoever with the plaintiff herein.

WHEREFORE the defendant prays this Honorable Court that the petition of the plaintiff be dis-

missed and he be allowed to go without day and recover his costs.

(Sgd.) FLEMING, DAVIES & BRYAN,
Attorneys for the Defendant.

R. T. Bryan, Jr., being first duly sworn, says that he is a member of the firm of Fleming, Davies & Bryan, attorneys for the defendant; that he has read the foregoing plea in [5] abatement; knows the contents thereof; that the same are true to the best of his knowledge, information and belief; and that his reason for making this affidavit is that W. A. Burns, attorney in fact for the defendant company, is not in Shanghai.

(Sgd.) R. T. BRYAN, Jr.

Sworn and subscribed to before me this the 22d day of July, 1919.

(Sgd.) JAMES P. CONNOLLY,
Clerk of the Court.

Filed at Shanghai, China, July 22d, 1919. (Sgd.)
James P. Connolly, Clerk. [6]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE,

Plaintiff,

vs.

AMERICAN TRADING CO.,

Defendant.

Amended Plea in Abatement.

Now comes the defendant and respectfully shows to this Honorable Court:

1. That the contract referred to in allegation 2 of the plaintiff's petition and marked Exhibit "A" was entered into by and between the plaintiff herein and the American Trading Co. (Pacific Coast), which said company was duly organized, created, and is existing solely by virtue of the laws of the State of California, United States of America.

2. That the defendant company was organized, created, and is existing solely by virtue of the laws of the State of Maine, and is an entirely separate and distinct company from the American Trading Co. (Pacific Coast).

3. That the defendant company has never entered into the contract set forth in plaintiff's petition, and marked Exhibit "A," either directly or through an agent, with the plaintiff herein.

4. That on the 2d of May, 1919, the plaintiff and the defendant entered into a written agreement to settle their several disputes by arbitration, which said agreement is hereafter specifically set forth as follows: [7]

"May 2, 1919.

"H. E. Roland S. Morris,

American Ambassador, Tokyo.

Sir: In accordance with your kind suggestion, we, the undersigned, agree to the arbitration of our differences by the Honorable Mr. Potter, and undertake

to abide by and put into effect whatever award he makes.

We remain, dear sir,

Yours very respectfully,

AMERICAN TRADING COMPANY,

(Sgd.) D. H. BLAKE,

Vice-president.

AMERICAN TRADING COMPANY,

(Sgd.) A. T. STEELE,

Acting Accountant."

5. That in pursuance of said agreement the plaintiff and the defendant submitted their several disputes to a Mr. Potter, who was the arbitrator specified in said agreement.

6. That the said Mr. Potter, after having heard the plaintiff and the defendant as to their respective contentions, duly submitted and published an award in favor of the defendant herein which said award is hereafter more specifically set forth as follows:

"Mr. A. Tilton Steele has a contract with the American Trading Co. (Pacific Coast), a company which Mr. D. H. Blake states is an associated but with a separate and distinct organization from his American Trading Co., in Tokyo. The American Trading Co. (Pacific Coast), signed by Louis A. Ward, vice-president and manager, makes a three-year contract from July 1, 1918, with Mr. Steele as chief accountant at their [8] Shanghai office including transportation thereto. On his way to Shanghai Mr. Steele was stopped at Yokohama by wireless from Mr. Blake and requested to assume temporarily the duties of a Mr. Boyd of the Tokyo

office while the latter was away on holiday. In the meantime it is developed that Mr. Steele's services were not needed at Shanghai and Mr. Blake states in writing that he began to negotiate with Mr. Steele for a cancellation of his contract and recommends to Mr. Steele that the matter should be referred to Mr. Louis A. Ward, vice-president and manager of the American Trading Co. (Pacific Coast), who had made the contract hereinbefore mentioned. Mr. Blake also writes that he never had any intention to disregard Mr. Steele's rights under this contract. In Mr. Blake's letter dated March 19, 1919, he writes in part as follows: 'We have received word from Mr. Burns, agent of Shanghai office, that as he has made satisfactory arrangements with Mr. Manley (the chief accountant whose position under the contract Mr. Steele was to take) to remain with the company, he, Mr. Burns, did not now wish Mr. Steele to come to Shanghai. We also confirm our statement that as soon as Mr. Boyd returns to his position in Tokyo, probably about the end of April, we have no further use for your services here; we cannot say what your recourse will be under your contract, but as intimated the other day, the writer will be glad to render you such assistance as he can in order to effect a mutual satisfactory settlement—but before anything can be done in this connection it will be necessary for you to make some suggestions in the premises.'

Mr. Blake's next letter is May 6th, in which he demands the return of a number of keys which he claims belongs to the company and notifies Mr.

Steele that he has a debit balance of Y541.21, which he asks payment of at once to Mr. Blake. [9] Mr. Blake in letter to Mr. Steele dated August 27, 1918, employs him temporarily in Tokyo for practically the same salary as his contract, and temporary employment to be for such time that Mr. Boyd is absent on holiday, which Mr. Blake estimates will be about six months. Mr. Blake further adds in this letter this time will of course apply to Mr. Steele's three-year term as mentioned in original contract. Mr. Blake concludes this letter as follows: "It is understood between us that this temporary arrangement does not prejudice any verbal understanding which you (Mr. Steele) may have had with Mr. Ward or with Mr. Burns prior to your departure from San Francisco.

Mr. Steele also claims that he had a verbal understanding in San Francisco with Mr. Burns of the Shanghai office, that his passage back to San Francisco, including all legitimate traveling expenses were to be paid by the company and both Mr. Ward and Mr. Burns stated to him (Mr. Steele) that this was the custom of the company in all cases of covenanted servants and that Mr. Steele would of course be treated in the same way.

After reading over carefully the briefs which have been submitted by both Mr. Blake and Mr. Steele I am of the opinion that the matter of the 3-year contract should be referred to Mr. Ward in San Francisco for settlement.

Second. That Mr. Blake should pay Mr. Steele in full until such time as Mr. Steele can secure first-

class passage back to San Francisco, less any indebtedness that may be proved that Mr. Steele owes Mr. Blake.

Hoping that this conclusion may be mutually satisfactory, I am, gentlemen,

Yours very sincerely,

(Signed). [10]

P. S. Mr. Steele's passage to San Francisco to be paid by Mr. Blake's Corp.

To Mr. D. H. Blake,

Vice-president American Trading Co.,

Tokyo, Japan.

7. That the said award is final and conclusive as to the facts alleged in the plaintiff's petition and is a bar to this action.

WHEREFORE the *plaintiff* prays this Honorable Court that the petition of the plaintiff be dismissed and it be allowed to depart hence and recover its costs.

(Sgd.) FLEMING, DAVIES & BRYAN,
Attorneys for Defendant.

W. A. Burns, being first duly sworn, deposes and says: That he is the attorney in fact of the American Trading Co., that he has read the foregoing amended plea in abatement, knows the contents thereof, and that the same are true to the best of his information, knowledge and belief.

Sworn and subscribed to before me this 28th day of November, 1919.

(Sgd.) W. A. BURNS.

(Sgd.) JAMES P. CONNOLLY,

Clerk.

Filed at Shanghai, China, November 28, 1919.
James P. Connolly, Clerk. [11]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE

vs.

AMERICAN TRADING COMPANY,

Motion.

Take notice that the defendant proposes to move this Honorable Court as soon as counsel may be heard:

1st. For an order for the taking of depositions of Mr. Potter at Philadelphia, Pa., Louis A. Ward at San Francisco, California, and D. H. Blake at London, England, all of which persons are without the jurisdiction of this Court and material witnesses to support the defendant's amended plea in abatement as appears by affidavit hereunto attached and marked Exhibit "A."

2d. That the hearing of the defendant's amended plea in abatement be postponed until such depositions have been returned to this Court.

(Sgd.) FLEMING, DAVIES & BRYAN,
Attorneys for Defendant.

Filed at Shanghai, China, December 19, 1919.
James P. Connolly, Clerk. [12]

Exhibit "A."
AFFIDAVIT.

W. A. Burns being first duly sworn, deposes and says:

1st. That he is the attorney in fact of the American Trading Co.

2d. That Mr. Potter, Louis A. Ward, and D. H. Blake are material witnesses to prove the facts alleged in defendant's amended plea in abatement.

3d. That he has used proper diligence to obtain the evidence of the persons aforesaid.

4th. That said persons aforesaid are without the jurisdiction of this Court and no one else can testify to the facts within their knowledge.

(Sgd.) W. A. BURNS,
Affiant.

Sworn and subscribed to before me this the 19th day of December, 1919.

(Sgd.) JAMES P. CONNOLLY. [13]

Exhibit "B."

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE,

vs.

AMERICAN TRADING COMPANY,
AFFIDAVIT.

J. B. Manley, being first duly sworn, deposes and says:

1. That he is the chief accountant of the American Trading Co. at Shanghai China.

2. That he is acquainted with the material facts involved in the case of Steele vs. The American Trading Co.

3. That Mr. Potter, Louis A. Ward, and D. H. Blake are important, material and necessary witnesses to prove the facts alleged in defendant's amended plea in abatement; that the said Mr. Potter, Louis A. Ward, and D. H. Blake are residing in places more than 1,000 miles from the jurisdiction of this Court.

4. That all the facts which the said witnesses will testify to are facts which arose relating to things happening without the jurisdiction of this Court; that the American Trading Co., through its proper officers, has used due and proper diligence to obtain the evidence of the said Mr. Potter, Louis A. Ward, and D. H. Blake.

5. That the contract attached to plaintiff's petition was signed in San Francisco, California, United States of America, without the jurisdiction of this Court; that the alleged breach of said contract occurred in Japan without the jurisdiction of this Court; and that no one in Shanghai connected with the American Trading Co. can testify to the [14] facts surrounding the signing of said contract or the facts leading up to the alleged breach.

6. That your affiant is informed and believes and therefore says that Mr. Potter will testify in substance as follows: "I was the arbitrator in the Matter of Steele vs. the American Trading Co., which

matter was arbitrated in Japan in the American Embassy at Tokyo. The agreement to arbitrate set forth in the defendant's amended plea in abatement was the agreement under which the arbitration was conducted. The award set forth in the plaintiff's amended plea in abatement was the award handed down by me. I understood that this award was to be final and binding upon the parties.

7. That your affiant is informed and believes that Mr. D. H. Blake will testify substantially as follows: "The contract referred to in allegation 2 of plaintiff's petition and marked Exhibit "A," was made by the American Trading Co. (Pacific Coast), which company was organized under the laws of the State of California, and is entirely separate and distinct from the American Trading Co. of which I was the manager at Tokyo. The corporation of which I was the manager was organized under the laws of the State of Maine. The defendant, that is, the company of which I was the manager, never made the contract set forth in plaintiff's petition, either directly or through an agent. The only contract that we had with Mr. Steele was a temporary agreement, and if he was discharged, he was discharged under the temporary agreement. The agreement to arbitrate is composed of a letter dated May 2, 1919, addressed to Roland E. Morris and signed by me and Mr. Steele. The other letters, if any, referring to the arbitration, lead up to this final agreement which includes everything referring to the submission and arbitration. That in pursuance of this agreement to arbitrate, the matter was arbitrated by Mr. Potter,

[15] who handed down his award, a copy of which is set forth in the defendant's plea in abatement. To the best of my information, knowledge and belief, this is a true copy. This award, as I understood it, was final and binding upon the parties. Mr. Steele was discharged under a temporary contract in Tokyo, Japan. All of the things alleged in plaintiff's petition took place in San Francisco or Japan. Mr. Burns of the American Trading Co. has written me relative to the matter."

8. That your affiant is informed and believes and further says that Mr. Louis A. Ward will testify in substance as follows: "That the American Trading Co., Pacific Coast, was organized under the laws of the State of California. The American Trading Co. in Shanghai and Tokyo are branches of American Trading Co. organized under the laws of the State of Maine and is an entirely separate and distinct company from the American Trading Co., Pacific Coast. The Contract alleged in plaintiff's petition and marked Exhibit "A," is signed by the American Trading Co., Pacific Coast, and not by the American Trading Co. of Maine."

Sworn and subscribed to before me this 8th day of Jan. 1920.

(Sgd.) J. B. MANLEY,

(Sgd.) JAMES P. CONNOLLY.

Filed at Shanghai, China, January 8, 1920. (Sgd.)
James P. Connolly, Clerk. [16]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE

vs.

AMERICAN TRADING COMPANY.

Amended Motion.

Take notice that the defendant proposes to move this Honorable Court as soon as counsel may be heard:

1. For an order for the taking of depositions on commission of Mr. Potter at Philadelphia, Pennsylvania, Louis A. Ward at San Francisco, California, and D. H. Blake at London, England, all of which persons are without the jurisdiction of this Court and material witnesses to support the defendant's amended plea in abatement as appears by affidavits hereunto attached and marked Exhibit "A" and "B."

2. That the hearing of defendant's amended plea in abatement be postponed until such depositions have been taken on commission and returned to this Court.

(Sgd.) FLEMING, DAVIES & BRYAN,
Attorneys for Defendant.

Filed at Shanghai, China, January 9, 1920. (Sgd.)
James P. Connolly, Clerk. [17]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE

Plaintiff,

vs.

AMERICAN TRADING COMPANY,

Defendant.

Order to File Amended Answer.

By consent of plaintiff's counsel in open Court defendant is hereby given leave to file an amended answer on or before January 16, 1920.

By the Court.

(Sgd.) CHARLES S. LOBINGIER.

Judge.

Filed January 9, 1920. James P. Connolly, Clerk
[18]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE

vs.

AMERICAN TRADING COMPANY.

Affidavit.

W. A. Burns, being first duly sworn, deposes and says:

1. That he is the attorney in fact of the American Trading Co., at Shanghai, China.

2. That one D. H. Blake is a necessary and material witness for the defendant; that the defendant cannot proceed to trial without the testimony of the said D. H. Blake; that all acts alleged in plaintiff's petition occurred without the jurisdiction of this Court.

3. That your affiant is informed and believes and therefore says that the said D. H. Blake will testify in substance as follows: "I was the manager of the American Trading Co., at Tokyo, and Mr. A. T. Steele was under my direct charge and supervision while he was working at that office. The services rendered to the American Trading Co., by A. T. Steele were inefficient and unsatisfactory; he was insubordinate and disrespectful to his superiors, refusing to obey instructions; he came to the office late in the morning and did not stay after office hours in the evening, although he was repeatedly warned to come on time; he wrote letters to Mr. Ward who had no connection with the American Trading Co., of Tokyo, telling him of the business of the Tokyo office and its affairs, which Mr. Ward had no right to know. Mr. Steele was too small a man for the place and [19] did not in any sense render services satisfactory to the company. His services were not only unsatisfactory, but he was a disturber, causing the

other employees to be discontented and dissatisfied.”

4. That your affiant makes this affidavit as to the testimony of the said D. H. Blake upon information and belief, which said information is based upon correspondence received from the said D. H. Blake, and conversations had with him, the said D. H. Blake.

5. That your affiant has used due diligence to obtain testimony of the said D. H. Blake; that at the time this suit was instituted your affiant had no direct knowledge of the facts alleged in the plaintiff's petition, and had to acquire knowledge thereof by means of correspondence with D. H. Blake; that Mr. Blake has since the institution of this action gone to London, where is the manager of the London office of the American Trading Co., and our affiant had to correspond with him there in order to acquire knowledge of the details of this case; and that on account of these reasons the defendant has been unable to move for an order to take the deposition of D. H. Blake on commission sooner than at the present time.

(Sgd.) W. A. BURNS.

Sworn and subscribed to before me this 13th day of January, 1920.

(Sgd.) JAMES P. CONNOLLY,
Clerk of the Court.

Filed at Shanghai, China, January 13, 1920.
Bernyce H. Smith, Deputy Clerk. [20]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE

vs.

AMERICAN TRADING COMPANY.

Motion to Take Deposition.

Take notice that the defendant through its counsel proposes to move this Honorable Court on Tuesday, January 13, 1920, at 3:30 P. M. o'clock, for an order to take the deposition on commission of D. H. Blake in London, England, it appearing by affidavit hereto attached that the said D. H. Blake is a material and necessary witness and that the defendant has used due diligence to obtain the evidence of the said D. H. Blake, and for a further order postponing the trial of this case until said deposition has been returned to this Court.

(Sgd.) FLEMING, DAVIES & BRYAN,
Attorneys for Defendant

Filed at Shanghai, China, January 13, 1920.
James P. Connolly, Clerk. [21]

In the United States Court for China.

Cause No. 798.

Civil No. 272

A. T. STEELE,

Plaintiff,

vs.

AMERICAN TRADING CO.,

Defendant.

Order Setting Date of Trial.

This cause comes on for hearing on defendant's motion to take deposition on commission;

On consideration whereof, plaintiff's counsel having agreed in open Court to waive objections to the letters written by the proposed witness and to the testimony of the affiant in support of said motion as to conversations with said witness regarding the subject matter of said proposed testimony, said waiver being restricted to such objections as relate only to the secondary character of said evidence;

The said motion is accordingly overruled and by consent of both parties this cause is set for trial on Friday, January 23, at 9:30 A. M.

By the Court.

(Sgd.) CHARLES S. LOBINGIER,

Judge.

Filed January 14, 1920.———, Clerk. [22]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE

vs.

AMERICAN TRADING CO.

Amended Answer.

The defendant answering the petition of the plaintiff, respectfully shows to this Honorable Court:

As a first defense, the defendant alleges:

1. That allegation 1 is admitted.

2. That allegations 2, 3, 4, 5, and 6 are denied.

As a second defense, the defendant alleges:

3. That the contract referred to in allegation 2 of plaintiff's petition and marked Exhibit "A" was entered into by and between the plaintiff herein and the American Trading Co., Pacific Coast, which said company was duly organized, created and is existing solely by virtue of the laws of the State of California, United States of America.

4. That the defendant company was organized, created and is existing solely by virtue of the laws of the State of Maine, and is an entirely separate and distinct company from the American Trading Co., Pacific Coast.

5. That on the 2d of May, 1919, the plaintiff and the defendant entered into a written agreement to settle their several disputes by arbitration, which

said agreement is hereby specifically set forth as follows:

“May 2, 1919.

H. E. Roland S. Morris,
American Ambassador, Tokyo.

Sir: In accordance with your kind suggestion, we, the undersigned, [23] agree to the arbitration of our differences by the Honorable Mr. Potter, and undertake to abide by and put into effect whatever award he makes.

We remain, Dear Sir,

Your very respectfully,

AMERICAN TRADING COMPANY,

(Signed) D. H. BLAKE,

Vice President.

AMERICAN TRADING COMPANY,

(Signed) A. T. STEELE,

Acting Accountant.

6. That in pursuance of said agreement the plaintiff and the defendant submitted their several disputes to a Mr. Potter, who was the arbitrator specified in said agreement.

7. That the said Mr. Potter, after having heard the plaintiff and the defendant as to their respective contentions, duly submitted and published an award in favor of the defendant herein which said award is hereafter more specifically set forth as follows:

“Mr. A. Tilton Steele has a contract with the American Trading Co., (Pacific Coast) a company which Mr. D. H. Blake states is an associated but with a separate and distinct organiza-

tion from his American Trading Co., in Tokyo. The American Trading Co., (Pacific Coast) signed by Lewis A. Ward, Vice President and manager makes a three year contract from July 1st, 1918, with Mr. Steele as chief accountant at their Shanghai office including transportation thereto. On his way to Shanghai Mr. Steele was stopped at Yokohama by wireless from Mr. Blake and requested to assume temporarily the duties of a Mr. Boyd of the Tokyo office while the latter was away on a holiday. In the meantime it is developed that Mr. Steele's services were not needed at Shanghai and Mr. Blake states in writing that he began to negotiate with Mr. Steele for a cancellation of his contract and recommends to Mr. Steele that the matter should be referred to Mr. Louis A Ward, vice-president and manager of the American Trading Co., (Pacific Coast) who had made the contract hereinbefore mentioned. Mr. Blake also writes that he never had any intention to disregard Mr. Steele's rights under this contract. In Mr. Blake's letter dated March 19, 1919, he writes in part as follows: 'We have received word from Mr. Burns, agent of Shanghai office that he has made satisfactory arrangements with Mr. Manley (chief accountant) whose position under the contract Mr. Steele was to take) to remain with the company, he, Mr. Burns, did not wish Mr. Steele to come to Shanghai. We also confirm our statement that as soon as Mr. Boyd returns to his position in Tokyo, probably about the end

of April we have no further use for your services [24] here, we cannot say what your recourse will be under your contract, but as intimated the other day the writer will be glad to render you such assistance as he can in order to effect a mutual satisfactory settlement—but before anything can be done in this connection it will be necessary for you to make some suggestions in the premises.’

Mr. Blake’s next letter is May 6th, in which he demands the return of a number of keys which he claims belongs to the company and notifies Mr. Steele that he has a debit balance of Tls. 541.21 which he asks payment of at once to Mr. Blake. Mr. Blake in letter to Mr. Steele dated August 27th, 1918, employs him temporarily in Tokyo for practically the same salary as his contract, said temporary employment to be for such time that Mr. Boyd is absent on holiday which Mr. Blake estimates will be about six months. Mr. Blake further adds in this letter this time will of course apply to Mr. Steele’s three year term as mentioned in original contract. Mr. Blake concludes this letter as follows: “It is understood between us that this temporary arrangement does not prejudice any verbal understanding which you (Mr. Steele) may have had with Mr. Ward or Mr. Burns prior to your departure from San Francisco.

Mr. Steele also claims that he had a verbal understanding in San Francisco with Mr. Burns of the Shanghai office, that his passage back to

San Francisco including all legitimate travelling expenses were to be paid by the company and that both Mr. Ward and Mr. Burns stated to him (Mr. Steele) that this was the custom of the company in all cases of covenanted servants and that Mr. Steele would of course be treated in the same way.

After reading over carefully that briefs which have been submitted by both Mr. Blake and Mr. Steele I am of the opinion that the matter of the 3 year contract should be referred to Mr. Ward in San Francisco for settlement.

Second. That Mr. Blake should pay Mr. Steele in full until such time as Mr. Steele can secure first class passage back to San Francisco less any indebtedness that may be proved that Mr. Steele owes Mr. Blake.

Hoping that this conclusion may be mutually satisfactory, I am, Gentlemen,

Yours very sincerely,

(Signed)

P. S. Mr. Steele's passage to San Francisco to be paid by Mr. Blake's Corp.

To Mr. D. H. Blake,

Vice President American Trading Co.,

Tokyo, Japan."

8. That the said award which the defendant offered to carry out is final and conclusive as to the facts alleged in the plaintiff's petition and is a bar to this action. As a third defense, the defendant alleges: [25]

9. That the contract alleged in the plaintiff's petition, a copy of which is attached thereto and marked Exhibit "A," is a contract for personal services not to be performed within a year from the making thereof, and is not signed by the defendant nor by his duly authorized agent, and as such is within the statute of frauds which said statute the defendant herein specifically pleads as a bar to this action.

10. That the alleged services rendered by the plaintiff herein to the defendant were neither satisfactory nor efficient, as required in the contract alleged in plaintiff's petition, a copy of which is attached thereto and marked Exhibit "A," and that the said plaintiff in the performance of his alleged duties was inefficient, negligent and insubordinate to his superiors.

WHEREFORE the plaintiff prays this Honorable Court that the petition of the plaintiff be dismissed and it be allowed to depart hence and recover its costs.

(Sgd.) AMERICAN TRADING CO.,
W. A. BURNS, Agent,
Defendant.

FLEMING, DAVIES & BRYAN,
Attorneys for Defendant.

W. A. Burns being first duly sworn, deposes and says:

That he is the attorney in fact of the American Trading Co., that he has read the foregoing amended answer, knows the contents thereof, and that the same are true to the best of his information, knowledge and belief.

Sworn and subscribed to before me this 13th day of Jan. 1920.

(Sgd.) W. A. BURNS.

(Sgd.) JAMES P. CONNOLLY.

Filed at Shanghai, China, January 16, 1920.
James P. Connolly, Clerk. [26]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE

vs.

AMERICAN TRADING COMPANY.

Replication.

The plaintiff, in reply to the new matter set forth in the answer of the defendant herein, alleges as follows:—

1. Plaintiff admits that an agreement in the form set forth in paragraph 5 of defendant's answer was entered into by plaintiff and defendant but plaintiff alleges that said agreement does not set forth the subject matter to be submitted to the arbitrator nor the terms and conditions of the arbitration.

2. Plaintiff denies that the award set forth in paragraph 7 of defendant's answer is final and conclusive and a bar to this action and alleges that said award is void and of no effect and not binding upon plaintiff.

3. In reply to paragraph 9 of defendant's answer, plaintiff denies that said contract is not signed by a duly authorized agent of the defendant company and further denies that said contract is within the statute of frauds or is a bar to this action.

(Sgd.) A. TILTON STEELE.

On this — day of January, 1920, before me personally came A. T. Steele, who being by me duly sworn, did depose and say that he is the plaintiff herein; that he has read the foregoing replication and knows the contents thereof and that the matters therein are true to the best of his knowledge, information and belief.

(Sgd.) JAMES P. CONNOLLY,
Clerk United States Court for China.

Filed at Shanghai, Jan. 21, 1920. James P. Connolly, Clerk. [27]

A. T. STEELE

vs.

AMERICAN TRADING COMPANY.

PLAINTIFF'S EXHIBITS. [28]

Plaintiff's Exhibit "A."

San Francisco, Cal.

May 27, 1918.

Mr. A. Tilton Steele,
Present.

Dear Sir:—Confirming the writer's conversations with you during the past few days, we have employed you as follows:

Position: Chief Accountant of our Shanghai

office, the duties of which office you are to take up as quickly as possible, proceeding herefrom for Shanghai within about thirty days.

Duration of Employment: Three years from July 1st next or earlier if the time of your departure from San Francisco for Shanghai hereunder be earlier. Should you not leave San Francisco for Shanghai hereunder prior to July 1st, next, your salary will commence on July 1st.

Compensation: Two Hundred and Fifty (\$250.00) Dollars U. S. Gold per month for the first year and for the second and third year adjustments of salary to be made at the end of the first and second year, as may be mutually agreed; your compensation, however, not to be less than Ten Thousand (\$10,000.00) Dollars for the entire period of three (3) years.

Satisfactory Service: The undertakings herein contained on our part are all conditioned upon your doing your work in an efficient and satisfactory way.

Transportation to Shanghai: In addition to salary as herein provided, we will provide you with first-class transportation to Shanghai.

Bond: It is a condition of your employment that you give any bond the Company may require, the Company paying [29] the premium thereon.
Exhibit A.

Yours truly,

AMERICAN TRADING COMPANY.

(Pacific Coast.)

(Sgd.) LOUIS A. WARD,

Vice-President and Manager.

Confirmed and accepted.

(Sgd.) A. TILTON STEELE.

LAW—V. [30]

Plaintiff's Exhibit "B."

Kashimamaru. 1 Ra

Received: 3:45 a m.

Steele.

Passenger

Kashimamaru.

Tokyoyubin

via Choshimusen.

No. 97. Words 29.

Date: 19/8, 1918. Time: 11:10 a. m.

This is probability your being required Tokyo office for few months before going Shanghai please be prepared to leave ship in Yokohama. Blake.

AMERICAN TRADING. [31]

Exhibit B.

Plaintiff's Exhibit "C."

Tokyo, Aug. 27, 1918.

A. Tilton Steele, Esq.,

Present:

Dear Sir:—We beg to confirm our conversation of yesterday's date with reference to your temporary employment in this office.

Compensation: The compensation provided for in your original contract made with Mr. L. A. Ward, Vice-President and Manager of the American Trading Company of the Pacific Coast on May 27th calls for a salary of \$250.00 Gold per month,

or a salary of not less than \$10,000.00 Gold for the three years' period of your contract. We have arranged that you are to receive \$250.00 Gold at exchange 50, which is the equivalent of Yen 500.00 per month together with an additional allowance of Yen 150.00 per month to cover any additional expenses which you may be put to owing to the change in your plans. The two items above mentioned will make a total of Yen 650.00 per month which you will receive while you are in the employ of our Tokyo office.

Term of Employment: As explained to you, we wish you to remain in Tokyo during the time that Mr. Boyd is absent on holiday which we estimate will be about six months. This time will, of course, apply on your three years' term as mentioned in your original contract.

Travelling Expenses: Any legitimate travelling expenses incurred by you on behalf of the company will be refunded to you.

General: It is understood between us that this [32] temporary arrangement does not prejudice any verbal understanding which you may have had with Mr. Ward or with Mr. Burns prior to your departure from San Francisco.

We remain, Dear Sir,

Yours very truly,

AMERICAN TRADING COMPANY.

(Sgd.) D. H. BLAKE,

Vice-President.

Plaintiff's Exhibit "D."

Tokyo, March 19, 1919.

A. Tilton Steele, Esq.,

American Trading Co., Tokyo.

Dear Sir:—With reference to our conversation of a few days ago, we beg to confirm what we told you at that time, to the effect that we had received word from Mr. Burns, Agent of our Shanghai Office, that as he had made satisfactory arrangements with Mr. Manley to remain with the Company, he did not want you to come to Shanghai.

We also confirm our statement that as soon as Mr. Boyd returns to his position in Tokyo, probably about the end of April, we shall have no further use for your services here.

We cannot say what your recourse will be under your contract, but, as intimated the other day, the writer will be glad to render you such assistance as he can in order to effect a mutually satisfactory settlement,—but before anything can be done in this connection it will be necessary for you to make some suggestions in the premises.

We remain,

Yours very truly,

AMERICAN TRADING COMPANY,

(Sgd.) D. H. BLAKE,

Vice-President.

DHB/CP

EXHIBIT M 1 [34]

Plaintiff's Exhibit "E."

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[34A]

Plaintiff's Exhibit "F."

May 2d, 1919.

Mr. D. H. Blake,
Vice-President and General Manager,
American Trading Co.,

Present:

Dear Sir:—With further reference to the matter of giving up my office and handing over charge of my department to Mr. Boyd, which you wish me

to do immediately notwithstanding the fact that I am entitled to a month's written notice to that effect, under the Japanese law which you threaten to invoke, to compel me to do so, I am perfectly willing to hand over the keys of the safe, to Mr. Boyd, after I have duly accounted for the notes, securities, etc., which are in that safe, if it be distinctly understood between us in writing that in my doing so my rights and interests under my original agreement with the company made with Mr. Ward, and ratified by Mr. Burns, and later confirmed by you in your letter of appointment dated August 27, 1918, are not in any way prejudiced thereby.

It must also be distinctly understood between us in writing in accordance with the terms of my understanding with our Ambassador, the Hon. Mr. Roland Morris, reached in my conversation with him at the Embassy yesterday, that we are both to agree and to state such an agreement in writing to him, assenting to the arbitration of the Hon. Mr. Potter, whose award must be considered as binding to both parties in the matter [35] of the Exhibit O4.

main issue involved in the case, viz.: the amount of compensation to be paid to me at the Tokyo office of the Company in full settlement of all my claims against the Company under the two agreements I have with the Company.

Kindly confirm this understanding and oblige,
(Sgd.) A. T. STEELE. [36]

Plaintiff's Exhibit "G."

Tokyo, May 2, 1919.

A. T. Steele, Esq.,
Tokyo.

Dear Sir:—I am in receipt of your letter of even date, and in reply thereto would state that in giving up your duties and handing over charge of the Accountant Department to Mr. Boyd, as requested by me, both verbally and in writing, your rights and interests under your original agreement with the Company, or my letter of August 27th, 1918, will not be prejudiced in any way.

With reference to the Arbitration of our differences, I confirm my previously expressed willingness to acquiesce in the suggestion made by H. E. Ambassador Morris, that the Arbitration should be placed in the hands of the Honorable Mr. Potter, who is at present in Tokyo, and that his award should be binding on both parties, and shall be settled in Tokyo.

I remain,

Yours very truly,

AMERICAN TRADING COMPANY,

D. H. BLAKE,

Vice-President.

DHB/CP

EXHIBIT O 2 [37]

Plaintiff's Exhibit "I."

Arbitration of case *A. Tilton Steele vs. D. H. Blake*, Vice-president, American Trading Co., Tokyo, Japan.

Mr. A. Tilton Steele has a contract with the American Trading Co., (Pacific Coast) a company which Mr. D. H. Blake states is an associated but with a separate and distinct organization from his American Trading Co., in Tokyo. The American Trading Co., (Pacific Coast) signed by Lewis A. Ward, Vice-president and Manager, makes a three-year contract from July 1st, 1918, with Mr. Steele as chief accountant at their Shanghai office including transportation thereto. On his way to Shanghai Mr. Steele was stopped at Yokohama by wireless from Mr. Blake and requested to assume temporarily the duties of a Mr. Boyd of the Tokyo office while the latter was away on holiday. In the meantime it is developed that Mr. Steele's services were not needed at Shanghai and Mr. Blake states in writing that he began to negotiate with Mr. Steele for a cancellation of his contract and recommends to Mr. Steele that the matter should be referred to Mr. Lewis A. Ward, vice-president and manager of the American Trading Co., (Pacific Coast) who had made the contract hereinbefore mentioned. Mr. Blake also writes that he never had any intention to disregard Mr. Steele's rights under this contract. In Mr. Blake's letter dated March 19th, 1919, he writes in part as follows: "We have received word from Mr. Burns,

agent of Shanghai office, that as he has made satisfactory arrangements with Mr. Manley (the chief accountant whose position under the contract Mr. Steele was to take) to remain with the Company, he Mr. Burns did not now wish Mr. Steele to come to Shanghai. We also confirm our statement that as soon as Mr. Boyd returns to his position in Tokyo, probably about the end of April we have no further use for your services [38] here, we cannot say what your recourse will be under your contract, but as intimated the other day the writer will be glad to render you such assistance as he can in order to effect a mutual satisfactory settlement—but before anything can be done in this connection it will be necessary for you to make some suggestions in the premises.”

Mr. Blake's next letter is May 6th, in which he demands the return of a number of keys which he claims belong to the company, and notifies Mr. Steele that he has a debit balance of Y541.21 which he asks payment of at once to Mr. Blake. Mr. Blake's letter to Mr. Steele, dated August 27th, 1918, employs him temporarily in Tokyo for practically the same salary as his contract, said temporary employment to be for such time as Mr. Boyd is absent on holiday, which Mr. Blake estimates will be about six months. Mr. Blake further adds in this letter this time will of course apply to Mr. Steele's three-year term as mentioned in original contract. Mr. Blake concludes this letter as follows: “It is understood between us that this temporary arrangement does not prejudice any

verbal understanding which you (Mr. Steele) may have had with Mr. Ward or with Mr. Burns prior to your departure from San Francisco.

Mr. Steele also claims that he had a verbal understanding in San Francisco with Mr. Burns of the Shanghai office, that his passage back to San Francisco including all legitimate traveling expenses were to be paid by the Company and that both Mr. Ward and Mr. Burns stated to him (Mr. Steele) that this was the custom of the company in all cases of covenanted servants and that Mr. Steele would of course be treated in the same way.

After reading over carefully the briefs which have been submitted by both Mr. Blake and Mr. Steele I am of the opinion [38A] that the matter of the three-year contract should be referred to Mr. Ward in San Francisco for settlement.

Second. That Mr. Blake should pay Mr. Steele in full until such time as Mr. Steele can secure first-class passage back to San Francisco less any indebtedness that may be proved that Mr. Steele owes Mr. Blake.

Hoping that this conclusion may be mutually satisfactory, I am, gentlemen,

Yours very sincerely,

(Signed) WILLIAM POTTER.

P. S. Mr. Steele's passage to San Francisco to be paid by Mr. Blake's Corp.

To Mr. D. H. Blake,

Vice-president American Trading Co.,

Tokyo, Japan. [39]

Plaintiff's Exhibit "J."

5/6/1915.

Mr. A. Tilton Steele,
etc. etc. etc.

Dear Mr. Steele, Yours without date at hand, I will be glad to hear the briefs whenever ready. This I have expressed to both you and Mr. Blake.

After the briefs are received and studied, will notify both you and Mr. Steele date of conference.

Yours very sincerely,
(Sgd.) WILLIAM POTTER. [40]

Plaintiff's Exhibit "H."

ARTHUR TILTON STEELE versus AMERICAN
TRADING CO.

SECTION I.

Chronological Statement of the facts of the case.

(Period: San Francisco to Yokohama.)

(May, 1918, to August, 1918.)

Para. 1. On or about May 1st, 1918, I had a conversation in San Francisco with Mr. Louis A. Ward, Vice-president and General Manager of the American Trading Company (Pacific Coast) on the subject of "Trade Opportunities in British India." I had had several talks with him on the same subject on previous occasions. At the particular conference above referred to (which took place at the American Trading Company's Offices at No. 244 California Street, San Francisco, I made a specific proposal to Mr. Ward to go to the Orient in the interests of his Company.

Para. 2. Mr. Ward replied that he was going to New York shortly on Company's business; that he would bear my proposition in mind; that he would take it up in the Head Office with the Executives concerned, and that upon his return to San Francisco, he would advise me of the decision of the Company.

Para. 3. On or about May 20th, 1918, Mr. Ward, who had just returned from New York, telephoned to me at my office, Suite No. 1011-12 Mutual Savings Bank Building, and asked me to call and see him as he had something of interest to communicate to me. I then made an appointment to meet him at his office on the following day.

Para. 4. I kept my appointment; and Mr. Ward intimated to me that while my India proposition was of interest to his Company, [41] nothing definite would be done in the matter until after the war. He added that he had authority from the Head Office to offer me the position of Chief Accountant in the Shanghai Office of the Company, for prompt acceptance, as Mr. Manley, the then Chief Accountant, was about to leave the employment of the Company and an experienced accountant was needed to take his place without delay.

Para. 5. On or about May 25th, 1918, after due consideration of the above offer, I called again at Mr. Ward's office by appointment; and the result of that visit was that I accepted the position offered and, at Mr. Ward's request, signed a formal application for same, giving the fullest particulars of my experience and business connections. I left

this application with Mr. Ward who was to draw up an agreement in the form of a letter or memorandum to be signed by both of us after my record had been fully examined and verified. I may mention here that Mr. Ward has known me personally since 1909; and that he is also acquainted with a number of prominent business men for whom I have worked as auditor in San Francisco.

Para. 6. On May 27th, 1918, I again called by appointment at the Company's office; and on this occasion an agreement between the American Trading Company and myself, was signed by Mr. Ward as Vice-president of the American Trading Company, and by myself. The original of this agreement was handed to me and is hereunto attached and marked Exhibit "A."

Para. 7. At that time I was Managing Proprietor of The American Accounting Company of San Francisco, a firm of public accountants and auditors which I organized and equipped in San Francisco in January, 1909.

Para. 8. I at once commenced closing up my accounting business, transferring same to various accountants associated with me, and [42] generally winding up my business affairs so as to be ready to leave San Francisco on or before July 1st, 1918, to proceed to Shanghai to take up my position of Chief Accountant at the Shanghai office of the American Company, in accordance with the terms of the before mentioned agreement between that Company and myself.

Para. 9. After I had completed my arrange-

ments as above stated, I reported to Mr. Ward and handed him an application for bond of \$10,000 in terms of said agreement, duly filled in as directed by the Bonding Company. This application was signed by me in the presence of Mr. Ward. The name and Address of the Bonding Company was "The Ocean Accident and Guarantee Corporation," 55 John Street, New York City.

Para. 10. Owing to the war, it was very difficult at that time to procure a passage on a steamer to China, and to obtain a passport from the Department of State at Washington. I managed to procure both a passport and a steamer ticket on or about 1st August, 1918; and I was then instructed by Mr. Ward to leave San Francisco by rail, not later than August 6th, 1918, so as to be aboard the S. S. "Kashima Maru" sailing on August 9th, from Seattle, Washington, to Shanghai. Both railroad ticket to Seattle and steamer ticket to Shanghai were provided by the Company in accordance with my agreement; and I left San Francisco in accordance with instructions of the Company and of arrangements made for me.

Para. 11. During the latter part of July, 1918, Mr. Burns of the Shanghai Office of the American Trading Company, arrived in San Francisco. Mr. Ward introduced me to Mr. Burns, at 244 California Street; when Mr. Burns confirmed my appointment and stated that he was glad an American was going out to replace Mr. Manley, a Britisher, and that he would write to Mr. [43] Roper, Act-

ing-agent of the Company in Shanghai, giving full particulars regarding me.

Para. 12. I had in all, three interviews with Mr. Burns at the San Francisco office of the Company. Mr. Ward was present at one of these interviews. The three points which follow in addition to the terms of my written agreement were confirmed by Mr. Burns:

Point 1. Regarding the rate of exchange. I enquired of Mr. Burns if the Company allowed the foreign staff in Shanghai to draw their salaries at the customary rate, viz.: 1 U. S. gold dollar to 2 Mexican dollars. Mr. Burns replied that the Company paid its foreign staff at an even better rate than the one suggested by me, namely, .55 to the tael and .72 taels to 1 Mexican dollar. He figured out just how many Mexican dollars \$250. would amount to at the Company's special rate, and the result was found to be Mex. \$632.00. I have the penciled figures in the handwriting of Mr. Burns which I can produce as evidence.

Point II. The salary of U. S. \$10,000 for the three year period of my agreement was to be my minimum salary; it was clearly understood between us that the sum did not include bonuses given by the Company, nor any extra allowances.

Point III. My passage back to San Francisco, including all legitimate traveling expenses, was agreed to be paid by the Company. Both Mr. Ward and Mr. Burns stated that this was the custom of the Company in all cases of covenanted servants and that I should of course be treated in the

same way as all others in my position.

The above three points comprise "the verbal understanding" referred to in Mr. Blake's letter to me dated August 27th, 1918, which governs the terms of my employment in Tokyo and is hereunto attached and marked Exhibit "C."

Para. 13. After the above stated matters had been settled, Mr. Burns [44] handed me his portfolio of Shanghai office forms to look over. I took this home with me and the following morning I returned them to Mr. Burns who told me that he had written to the Acting Agent in Shanghai, Mr. Roper, requesting him to assist me in my efforts to serve the Company.

Para. 14. I desire here to state that the proceeds of various transfers of my accounting business before mentioned, aggregated U. S. \$4,400 including business for 1919 but not including furniture or equipment. I received this sum in a cash payment of U. S. \$2,000 down and by monthly instalments of U. S. \$200. The last of such monthly instalments was paid to the credit of my banking account on January 9th, 1919, and I can produce the duplicate deposit slip if required to do so.

Para. 15. I left San Francisco by train on August 6th, 1919, and arrived in Seattle on the morning of August 9th. On the same day I embarked on the S. S. "Kashima Maru" and sailed on that vessel from Seattle, on August 9th, 1918.

Para. 16. On or about August 19, 1918, and whilst aboard the said steamer en route for Shanghai, I received a wireless from Mr. Blake,

Vice-President and General Manager of the American Trading Company for China and Japan, advising me of the probability of my being required in the Tokyo office of the Company for a few months before proceeding to Shanghai. The original wireless message so received by me is hereunto attached and marked Exhibit "B."

(End of Section I.) [45]

SECTION II.

TOKYO OFFICE PERIOD.

(August, 1918—May, 1919.)

Para. 1. In consequence of the instructions mentioned in para. 16 of Section I of this brief, I called at the Tokyo office of the American Trading Company on August 23d, 1918, the date of my arrival at Yokohama, and saw Mr. Blake in his office. On the 24th of August, I again saw Mr. Blake at his private residence; and on the 26th, I had a further interview with this gentleman at his office. As a result of the above three interviews, was the agreement dated the 27th August, 1918, made between the American Trading Co., by its Vice-president and General Manager, Mr. Blake, and myself, covering the period of my temporary employment in the Tokyo Office. This agreement confirmed my original agreement made in San Francisco, as to salary, term of employment, etc., and the concluding paragraph (headed "General") reads as follows:

"It is understood between us that this temporary arrangement does not prejudice any verbal understanding which you may have had with Mr. Ward

or Mr. Burns prior to your departure from San Francisco.”

Original agreement which is in the form of a letter from the American Trading Company represented by Mr. Blake, to myself, is hereunto attached and marked Exhibit “C.”

Para. 2. On August 28th, 1918, I started work in the Tokyo office of my employers in the capacity of Acting Accountant, and I held that office during the absence on leave of Mr. C. A. S. Boyd, the permanent Accountant, who returned to Tokyo on or about April 30th, 1919. [46]

Para. 3. I worked continuously from August 28th, 1918, to May 1st, 1919, when I commenced handing over the management of the Accountant's Department to Mr. Boyd who resumed entire charge thereof on and from May 3d, 1919, and received from me all the notes, bonds, securities and valuables of the Company in the safes of the Tokyo office, complete and in order and all the keys and contents of furniture in said office (save only two keys in para. 20 hereof hereinafter referred to). I was released from all liability in connection with the above as from May 3d, 1919. The original receipts signed by Mr. Boyd and numbered 1, 2, & 3, are hereunto attached and marked respectively Exhibit “D-1,” Exhibit “D-2” and Exhibit “D-3.”

Para. 4. During the period of my employment—over eight months—I attended office on each and every business day, working continuously from 9 A. M. to 6 P. M., daily (save for slightly shorter hours during a few days of illness), not going out

to lunch, averaging eight hours a day, although the regular office hours were from 9 A. M. to 12:15 P. M., and from 1:30 P. M. to 5 P. M. I never lost a single day during this whole period, I even attended during illness and contrary to the advice of my doctor, in order to facilitate the business of the Company.

Para. 5. I claim that I discharged the duties of my position in an efficient and satisfactory manner. The last Report of the Auditors of the Company, which bears date the 19th day of April, 1919, (of which a copy is hereunto annexed and marked Exhibit "E"), and the files of correspondence which are hereunto annexed and marked respectively Exhibit "F," Exhibit "G" and Exhibit "H" will disclose that in the fulfillment of such duties I showed persistent loyalty to the interests of the Company as I saw them, in the face of discouragement [47] from other and senior officials of the Company.

Para. 6. I should like to observe that when I took over the charge of the Accounting Department of the Tokyo Office of the American Trading Company. I was fresh from the practice of my profession of Public Accountant in San Francisco where scientific accounting and office management have been developed to a high degree of excellence, and I was perfectly astounded to discover in the office of a first-class American Company, accounting methods which were considered obsolete by the profession in America and England, 20 years ago. The reports of the Company's Auditors will support what I say.

Para. 7. I believe that these same Auditors (Messrs. Harold Bell & Taylor, Chartered Accountants) will also testify if necessary to my persistent efforts to straighten out certain sections of the books and accounts of the Company, and to my plan to introduce certain much needed improvements in the system of accounts and collections, which, however, like Messrs. Bell & Taylor's own recommendations made as far back as 1916, failed to be effective because of the attitude of the management of the Company. A perusal of the Auditor's report (Exhibit "E") and the correspondence contained in the files marked Exhibit "F," Exhibit "G" and Exhibit "H," will convey to the Arbitrator a general idea of the conditions which I considered it my duty to attempt to correct, and the attitude of the management in connection with my proposals.

Exhibit "F" contains correspondence with Mr. Blake, Vice-president.

Exhibit "G" contains correspondence with Mr. Mauger, Agent, and

Exhibit "H" contains correspondence with Mr. L. R. Ward.

Para. 8. As it is possible that Mr. G. N. Mauger may be called as a witness in this case, I may mention that our business views have conflicted particularly in the matters of

- (1) Building Department Stock Account.
- (2) Building Department Account Sales. [48]
- (3) Mr. R. F. Moss, Building Department Manager's Commissions Account.

Exhibit "G" contains the correspondence dealing with items numbers 1 and 2.

Regarding item number 3 (Mr. Moss's Commission Account for the latter half of 1918) I felt it my duty to decline and did in fact decline to sign the statement which confirmed a credit of some yen 21,000 to Mr. Moss's account, because I did not think that he was actually entitled to the full amount of such credit. I also and for the same reason declined to endorse the estimated profit shown on the Account Sale of the Building Department Stock Account, viz.: yen 124,000 which yielded a commission of yen 9,300 to Mr. Moss. It would not have been proper for me to have endorsed same because the said Account Sale was not verified or taken from the main books. The former statement for yen 21,000 was signed over my head by Mr. Mauger; and the latter was adjusted without any reference to myself, between Mr. Mauger and Mr. Moss, sometime during February, 1919.

Exhibit "G" gives particulars and if others are wanted, I shall be prepared to supply them.

Para. 9. While my relations with Mr. Mauger were mutually satisfactory, so far as I am aware, my official position in relation to him as the Agent of the Company, and the necessity of signing documents, checks and the like jointly with him in the name of the Company, became difficult to sustain without bringing *bringing* upon myself criticisms which doubtless seemed proper to Mr. Mauger, but were to my mind entirely unmerited. Mr. Mauger was a responsible officer of the Company invested

with the power of approving and vetoing. I think that he sometimes overlooked the fact that I too had my responsibilities; and unlike myself Mr. Mauger had, in my opinion, a certain responsibility of friendship to Mr. R. F. Moss and [49] other heads of departments, which I have sometimes felt has led him to give way to discussion and decide against my views which were dictated only by loyalty to the interests of the Company as I saw them, and were not colored even in the faintest degree, by private or personal considerations.

Para. 10. On or about January 25th, 1919, I received a communication from the Head Office of The Ocean Accident & Guarantee Co., Limited (which has previously been mentioned in this brief of the Bonding Company) asking me to fill in a special form used in the cases of applicants who have been in business on their own account prior to employment by the American Trading Company.

Correspondence with this Bonding Company and Post Office Registration Receipt are hereunto attached and marked Exhibit "J."

Para. 11. Some time about the middle of February, 1919, I was advised by Mr. Blake, that the American Trading Company had decided to transfer their Bonding business to The Royal Indemnity Company of New York, and that all officers of the Company who were under bond or required to furnish bonds, should address new applications to this Company. A form of application was handed to me by Mr. Mauger. I filled in this form in accordance with instructions, and signed same in the pres-

ence of Mr. Mauger who added his name as a witness to my signature. I then handed my signed application to Mr. Mauger for forwarding to the Bonding Company.

Para. 12. On February 17th, 1919, I wrote a letter (of which a copy is hereunto attached and marked Exhibit "K"), and sent same to Mr. Burns, Agent of the Company in Shanghai. I have never received any reply to this letter. I wrote again on March 12th, 1919, to Mr. Burns. This second letter did not elicit [50] any reply and was returned to me about two weeks after its date, by Mr. Blake in Tokyo. (Original letter of March 12th, 1919, is hereunto attached and marked Exhibit "K-2.")

Para. 13. On the same March 12th (the date of writing my second letter to Mr. Burns), I mailed to my fiancée, Mrs. Margaret Cosgrave, a letter of credit on the San Francisco office of the American Trading Company, for \$250.00 to cover the cost of her passage to Shanghai. This lady had decided to come out to be married to me as soon as she had secured a 1st class berth on a suitable steamer to Shanghai. I advised Mr. Ward of the facts and enclosed a copy of the letter of credit with my communication to Mr. Ward.

A copy of the said letter of credit is hereunto annexed and marked Exhibit "L."

Para. 14. On March 17th, 1919, Mr. Blake summoned me to his private sanctum and informed me for the first time, that "as Mr. Burns of Shanghai Office, had made satisfactory arrangements with Mr. Manley to remain with the Company, he did not

want me to go to Shanghai," and also that he (Mr. Blake) would have no further use for my services, when Mr. Boyd returned to his position. The conversation was confirmed by a letter dated March 19th, 1919, which is hereto attached and marked Exhibit "M-1."

I replied that I would write to Mr. Ward on the subject and that pending his reply I did not feel able to come to any definite decision. A copy of my letter to Mr. Blake confirming this conversation and in reply to his letter of the same date, is hereunto attached and marked Exhibit "M-2." I believe that Mr. Blake also wrote to Mr. Ward on the matter as he handed me a copy of a letter which he stated he had sent to Mr. Ward. Said copy so handed to me is hereunto attached and marked Exhibit "M-3." [51]

Para. 15. During the afternoon of April 29th, 1919, Mr. Blake came to my room in the American Trading Company's office and inquired whether I could not be ready to hand over charge of my department to Mr. Boyd who would arrive in the office the following morning (April 30th, 1919). I replied that I had received no official notice of Mr. Boyd's return to Tokyo, and that it would not be possible for me to have things ready for handing over until May 1st, 1919.

Para. 16. The following morning (April 30th) I wrote Mr. Blake a letter concerning pending questions which I thought should properly be settled before I was called upon to hand over charge of my department. To this letter Mr. Blake replied at

once, absolving me of any responsibility, but refusing my recommendation, which had been approved by the Company's Auditors, for an investigation of the accounts of the Building Department, and shelving my suggestion for reorganization suggested in my letter to Mr. Blake of 12th April, 1919.

The above-mentioned letters of the 30th April, 1919, are hereto attached and numbered respectively Exhibit "N-1" and Exhibit "N-2."

Para. 17. Until the 30th April, I never had any friction with Mr. Blake, but upon that day Mr. Blake was guilty of the use of insulting and violent language to me in his office; he finally dismissed me from his presence, with the remarks that "he did not care where I went or what happened to me after I left the Tokyo office; that he was *though* with me; I could go back to San Francisco and get whatever redress I could out of Mr. Ward who made the agreement; that he (Mr. Blake) had had nothing to do with the making of the agreement and that he would have nothing more to do with it; that all he wanted was for me to get out of the office—the [52] sooner the better—after having handed over everything to Mr. Boyd."

Para. 18. On the following morning (May 1st) I addressed another letter to Mr. Blake, suggesting an arbitration of the matter, and a special understanding in writing between us to that effect. After a great deal of unnecessary invective and abuse, threats of criminal prosecution for wrongfully withholding the property of the Company and legal steps under Japanese law, Mr. Blake con-

sented to refer our contractual differences to arbitration. Mr. Mauger was present during the whole of this interview. On May 2d, 1919, Mr. Blake in his official capacity, and myself signed a reference to you and mutually undertook to abide by and carry out your Award when made. (Original letters of Mr. Blake dated 1st and 2d of May are hereunto attached and marked respectively Exhibit "O-1" and Exhibit "O-2" and copies of my replies of May 1st and 2d are hereunto attached and marked respectively Exhibit "O-3" and Exhibit "O-4." Copy of the Submission to Arbitration is hereunto attached and marked Exhibit "O-5."

Para. 19. On the morning of May 3d, upon my arrival at the office for the purpose of making over the notes, Bonds and other valuable securities contained in the safe of the Company under my charge, to Mr. Boyd, I discovered that my desk had been opened in my absence. I demurred to this action and at once wrote Mr. Blake upon the subject. In the absence of Mr. Blake, Mr. Mauger opened my letter and whilst I was working with Mr. Boyd, threw his reply upon my desk.

Copy of my letter to Mr. Blake (dated May 3d) and of Mr. Mauger's reply attached hereto and marked respectively Exhibit "P-1" and "P-2."

Para. 20. On March 8th, 1919, I received a letter from Mr. Blake asking me to send to him "certified copies" of such of my letters [53] to Mr. Ward as in any way related to the business of the Company; and Mr. Blake also enclosed a statement of my current account with the Company for set-

tlement. The same letter also refers to a number of office keys which Mr. Blake stated I must return to Mr. Boyd at once. I had two keys belonging to the American Trading Company, and two such keys only, in my possession. The reason I had them at the date in question was that in conformity with arrangements with Mr. Boyd, I went to my office on Sunday, May 4th, to remove certain of my personal effects from the desk which I had been using during the term of my employment, but found the office door locked from inside. I was thus unable to remove my effects as arranged, and was delayed in returning the keys. On the 8th instant, I called at the office, saw Mr. Boyd, removed my effects, turned over the two keys which I had to Mr. Boyd, and received from him a clear receipt covering all keys and contents of furniture in the office, complete and in order. (Said receipt is hereunto attached and marked Exhibit "D-3"— see para. 3 of this Section of the Brief.) Press copies or originals of all correspondence passing between said Mr. Ward and myself during the material period, are collected together in the bundle hereunto attached and marked Exhibit "H."

I have included the debit balance of yen 545.21 in my Particulars of Claim under the heading of "Deductions." Original letter of Mr. Blake's with statement of my current account as received by me as above, and my reply to same (press copy) are hereunto attached and marked respectively Exhibit "Q-1," and Exhibit "Q-3."

(End of Section 2.) [54]

SECTION III.

Statement of Claims.

In view of the facts hereinbefore stated, I contend that the American Trading Company have broken the contract concluded between that Company and myself at San Francisco on 27th May, 1918; and I have the honor to claim damages as follows:

Item 1. To Minimum salary payable to me under agreement of 27th May, 1918.		
U. S. Gold \$.....		10,000
Item 2. By salary received by me under agreement dated 27th August, 1918, 9 months at \$250.00 per month.....	2,250	
Item 3. July/18 salary paid in San Francisco.....	250	2,500
Item 4. Balance of salary outstanding computed at outstanding U. S. Gold \$ computed at Company's Shanghai Office rate 55 \$ to Tls. 100.....		
Item 5. Tls. 72 to \$ Mex. Mexican \$ converted into Japanese money at the current rate of Exchange..	18,938	
Item 6. Yen 1,765 to 1 Mexi can \$ Yen.....		Y33,427.35

Item 7. BONUS ADDITIONS.

Bonuses claimed by me for the two years 1919/20 and 1920/21 calculated on same basis of participation in profits of Company as actually paid to Mr. C. A. S. Boyd, Accountant & Mr. W. Gauge, Sub-Agent, as
 Amt. Forward..

Y 33,427.35
 [55]

their participation in the profits of 1918 viz.: yen 19,000 each. (Vide analysis of salaries, bonuses —& commissions paid to officers & heads of departments in 1918 which is attached hereto and marked "Exhibit R.".....

20,000,00

Item 8. Travelling expenses.

1st Class passage to San Francisco plus legitimate expenses of voyage. U. S. \$325.00 at say .50 yen.....650.00

1st class passage to Shanghai arranged for Mrs. M. M.

Cosgrave my fiancée as per

Item 9. Letter of Credit on San Francisco office of American Trading Co., for U. S. \$250 at say .50 yen.. 500.00

Item 10. 1st class passage re- turn to San Francisco of Mrs. M. M. Cosgrave (\$250) and approximate hotel expenses for one month in Shanghai (yen 300) yen.....	800.00	1,950.00
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Total of Claims.....Yen	55,377.35
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DEDUCTIONS

Item 11. By balance at debit of
Current Account of self as
on May 1st, 1919, as per
statement rendered (Ex-

hibit Q-2).....yen	545.21	545.21
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Forward.....	54,832.14
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[56]

Amt. Forward..... Y	54,832.14
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Item 12. By Amount of Letter of Credit \$250 if paid by San Francisco office of American Trading Co., (see tem 9).....	Yen 500	500.00
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NET AMOUNT OF CLAIM..Yen	54,332.14
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(P. T. O.)

[57]

Comparative Statement of Salaries, Bonuses & Commissions paid by the American Trading Company in Tokyo to Officers and Heads of Departments and principal Japanese Assistants.

Officers.	Salary Amount.	Ratio.	Annual Bonus.	Personal Commission.	Total.
G. N. Mauger, Agent, Y	11,500	4.25	2,000	46,928.62	60,428.70
W. Gauge, Sub-agent,	7,200	1.39	10,000	.....	17,200.00
C. A. S. Boyd, Accountant,	7,800	1.28	10,000	.....	17,800.00
Department Heads.					
P. Messer, Chief					
Engineer,	10,800	7.83	.....	84,634.58	95,434.58
R. F. Moss, Building					
Department,	3,000	13.61	.....	40,833.36	43,833.36
Japanese Staff.					
P. T. Yendo, Metal Dept.,	3,600	6.55	.....	23,566.45	27,166.45
S. Nakada, Import. “	2,400	3.14	.....	7,537.45	9,937.43
T. Ichii, “ “	2,400	2.66	.....	6,381.49	8,781.49
T. Fujita, “ “	1,440	2.46	.....	3,541.63	4,981.63

N. B. The Bonus paid to Messrs. Boyd and Gauge respectively, based on the profits of the Company during 1918, is the lowest in proportion to salary, of any of the above including the Japanese assistants, such proportion veing 1.28 and 1.39 in the respective cases. [58]

May 3, '19.

Securities in Safe.

- Envelope No. 1. Sekiguchi Shoten, Sundry Papers
(also in safe 2 packets of
shares)
- Envelope No. 2. S. Sugiyama—Mortgage deed.
- Envelope No. 3. T. Takeuchi 12 pcs. (120) Okachi
Slate Co.'s Shares.
- Envelope No. 4. Sugawara 20 Bonds Y20,000.00
- Envelope No. 5. Returned O. K.
- Envelope No. 6. Kumazawa Shoten (Contract &
Y1000.00 Bonds).
- Envelope No. 7. Y. Shinohara (Agreement).
- Envelope No. 8. Nanyo Boyeki Ka. (Y1300
Bonds).
- Envelope No. 9. Shimizu-gumi 3 Fire Insur.
policies.
- Envelope No. 10. Returned.
- Envelope No. 11. T. Takeuchi Sold and Credited
to Customer's a/c.
- Envelope No. 12. K. Yebihara various documents
& old papers.
- Envelope No. 13. D. Larrieu Rifles papers.
- Envelope No. 14. Okino Shoten Y13,000. Bonds.
- Envelope No. 15. Documents re. Yokohama Prop-
erty.
- Envelope No. 16. Naka Majiro 1 document.
- Envelope No. 17. Paul Messer (2 certs. A. T. Co.'s
shares) & 5500 U. S. Bonds
\$2500).
- Envelope No. 18. Returned.

- Envelope No. 19. Hanai & Co. (Y250.00 Japanese Gov't Bonds).
- Envelope No. 20. Kanagawa Denki Ka. Returned ok.
- Envelope No. 21. U. Yoshida Y200.00 Bonds (Balance returned).
- Envelope No. 22. Tanaka Shin Y2500. Bonds.
- Envelope No. 23. Returned.
- Envelope No. 24. Returned.
- Envelope No. 25. T. Wootton one cover sealed.
- Exhibit D1 [59]
- Envelope No. 26. Tokyo Kogyo Sha. (\$15,000.00 Bonds).
- Envelope No. 27. Returned.
- Envelope No. 28. Y. C. & A. C. (200 Debs Y1000.00).
- Envelope No. 29. International Trading Co., 500 shares.
- Envelope No. 30. Chiksan Mining Co., 1320 share O. K.
- Envelope No. 31. Nichibei Guaranty Trust Co., 900 shares O. K. Also 2 packets, shares Sekiguchi Shoten in safe 1 book cont'g \$600.00 of travelers' checks John Roberts in safe.
- Envelope No. 32. Kanagawa Denki 40 shares certificates.
- Envelope No. 33. Yamazaki Shoten 5. I. J. Gov't Bonds Y5000 fv.
- Envelope No. 34. D. H. Blake Bonds O. K. as per separate sheet.

- Envelope No. 35. S. Hirao I. J. G. Bonds Y5000
f. v.
- Envelope No. 36. Yazo Waki Shoten (2) two war-
rants.
- Envelope No. 37. T. Takizawa Shoten (2) war-
rants & one A. T. Co.'s godown
receipt.
- Envelope No. 38. Kyokuto Empitsu Go. k. (20
certs. shares.
- Envelope No. 35. Liberty Bonds C. A. S. B. \$200.00
A. A. Doney \$100.00.
- Envelope No. 40. Kojima 1 warrant. M. Itagaki
1 warrant (with Mr. Gauge for
renewal) and confirmed by
him.

Received The above complete and in order and
safe all in order.

(Sgd.) R. BOYD.

Exhibit D1.

[60]

May 3d, '19.

Mr. D. H. Blake's Bonds and Receipts.

Bonds on hand.....	Y 6500.	£200
Receipts for (Chosen Job).....	10000.	
“ “ (Mitsubishi).....	3500.	
“ “ (International Bank).	1500.	
“ held by (Eng. Dept. re T: M: Bureau)	3500.	

Y25,000. £200

Received the Above complete and In Order.

Also borrowed from

For A. T. Co.

H. & S. B. C. & with Intl. Bank.....Y3,000.

M. B. Bk. & with M. B. G. Ka..... 4,000.

Y7,000.

As Per Receipts.

(Sgd.) BOYD.

Exhibit D2.

[61]

MEMORANDUM.

May 8, 1919.

American Trading Company

Tokyo

Received from Mr. Steele, the keys of the office and contents of furniture in the accountant's office complete and in order.

AMERICAN TRADING COMPANY.

(Sgd.) BOYD,

Accountant

Exhibit D3.

[62]

Harold Bell & Taylor,
Chartered Accountants.

48 Yamashita—Cho,
Yokohama.

19th April, 1919.

American Trading Co.,

Tokyo.

Dear Sir:—We have completed a detailed examination of your books in our audit for the half year ending the 31st of December, 1918. As before, we

have examined the whole of the Bank in cash vouchers and all the postings from the numerous subsidiary cash books, day books and journals to the general ledger, with the exception of some journal postings of small amount. We enclose, in triplicate, a profit and loss account for the six months and a balance sheet at 31st December certified by us. These have been prepared by us independently of those already sent by you to New York. And after investigation, we have adopted the same provisions and reserves for unsettled items as those estimated by yourself, leaving the estimated profits unaltered. We have however, stated the amounts under somewhat different analysis, to show more clearly the position.

Profit and Loss Account. In this we have altered the salesroom profits, shown by you as Y27,129.12 to Y23,305.66, separating the profits added on your invoicing goods to the sales rooms: Y3,823.46, and showing these as a profit of your import Department. You will further notice that we have placed the Y40,000.00 written off the Yokohama property under the head of depreciation, so as to show a total of such items, instead of charging it separately as beyond the line of ordinary expenses.

Exhibit E.

[63]

Departmental Commissions have not borne either this depreciation item of Y40,000.00 nor the special provision of Y160,000.00 reserved against possible losses resulting from purchase of goods at high war prices, as these are considered special items. In

connection with this subject, we would suggest that a definite system of clearly kept accounts should be installed as part of your bookkeeping to ascertain and exhibit the profits, upon which departmental commissions are paid. In addition to the sums charged in the profit and loss account aggregating Y44,791.45, as you are aware, members of your Tokyo staff have participated in profits of Tokyo, Kobe and New York offices as follows:

Engineering Department, Kobe,

Mr. P. Messer10,220.12

Building Department, Kobe,

Mr. P. Messer 8,469.59

Building Department, All,

Offices, Mr. R. F. Moss21,481.69

40,171.40

Those commissions are charged in the first two instances to Kobe office and as regards the third item, being charged to the account sales it is proportionately borne by Tokio, Kobe and New York, so that we are not actually concerned therewith in our audit of our Tokio books. We refer to these figures, however, to lay stress upon the need for careful record and calculations as suggested above. Another view of these commissions that appears to us to call for some adjustment is the question of charging the commissions on departmental profits to Tokio, although the same are calculated on New York share of gross profits as well. To illustrate from the case of [64] the building department, we get the anomaly of the company earning, in Tokio,

Y3,705.32 while the manager of the engineering department receives as 6% on the profits Y2,920.57. This, of course, is caused by inclusion of such "profits" of the New York share of *gross* profits Y42,050.28, but none of this 6% is charged to New York, and the result is that out of Y6,625.89 net profits, Tokio pays Y2,920.57 purporting to be 6% on said "net profits." The question whether these commissions should be based thus, partly on gross profits and partly on net profits, is not one with which we called upon to deal, and we imagine this basis was fixed with the idea that the result of these transactions actually shows a certain profit, and it is of no interest to the departmental manager whether Tokio office retain all such profits or hand half thereof over to their head office. On the face of it this argument appears sound but should not the question be followed further and is it not a fact that if the arrangement, whereby the New York office receive half the profit on account sales, or gross profit, were not in existence, the cost of the goods to the Tokio office would of necessity be increased to cover New York overhead and profit, and as a result the profit on the transaction in Japan, and consequently the departmental managers commission, correspondingly reduced? In further reference to this question we find that the usual commission payable to Mr. R. F. Moss on the profit on building department "stock account" has not been included in the accounts for the half year under review, for the reason that the amount so due had, we understand, not yet been ascertained. We have

seen a statement showing a profit on this account of Y124,033.24 upon which commission $7\frac{1}{2}\%$ would be Y9,302.49, but we believe [65] it is felt that these figures which have been, we are informed, corrected several times, are still not sufficiently reliable to form the basis for a commission payment. It must be borne in mind therefore that, in so far as a liability exists in respect to this commission, the accounts for the half year ended 31st December, 1918 are incomplete.

Building department.—With reference to the “Stock Account” of this department, alluded to in the last paragraph, we consider the method of treating Kahn materials as one invoice or venture, in your invoice ledger an almost insuperable obstacle to correct and accurate accounting. We understand that, as a result of your acting accountant’s recommendations, a subdivision of this account has already taken place but even so we fear this “Stock Account” will remain very involved. At the present time the debit balance on this invoice ledger account is less by over Y150,000 than the actual cost value of the Kahn materials on hand, as the profits, resulting from the transfers to contracts at a price actually above cost, have never been taken into the main books.

One result of this, besides creating a “Secret Reserve,” is that it is practically an impossibility to reconcile the physical inventory with the invoice ledger which creates a very obvious danger point. We consider that every effort should be made to ascertain the actual results from the beginning of

this invoice ledger account up to a certain date, on which a very careful physical inventory should be taken, and the account closed on the basis of such inventory by transferring the profits and/or losses up to that date. As far as possible separate invoice ledger accounts should thereafter be kept for each shipment. This may involve more detailed work, [66] but even so, we consider the labor would be justified, as current and accurate results could then be obtained as regards the working of an important department, which are quite impossible under the present cumbrous system.

Bookkeeping. This brings us naturally once again, to the question of the desirability and, we believe, urgent need for improvement in your detailed bookkeeping, which we understand Mr. Mauger and your accountant Mr. Boyd had under consideration. In Mr. Boyd's absence, your acting accountant, Mr. Steele has gone further into these matters, and is, we believe, making suggestions to you thereupon. This being so, we do not propose to specially report upon the necessary improvements and alterations in parts of your bookkeeping system to meet the requirements of your increase in business, beyond referring once more to our report upon this subject, dated 26th June, 1916, and especially to paragraph under the heading of Ventures, on page 4 and 6 thereof.

Inventory. As mentioned in our report of 2nd April 1, 1917, the asset appearing in your balance sheet as "Stocks" represents merely that balance of your invoice ledger, rather than the value of an

actual physical inventory and though we are informed that the latter is duly reconciled with such balances, except in the case of the building department as already mentioned, we should like to see some system instituted whereby a more ready comparison would be possible. We believe that if our recommendations with regard to making a radical change in the method of recording charges on imports, were given effect to, it would become a much simpler matter to agree the invoice ledger balances with the inventory, as well as saving a very considerable [67] amount of bookkeeping.

Balance Sheet. We have separated in this the various items of Suspense Account under the correct heading so as to show the distinct liabilities and assets. In the sheet prepared by you Yen 3,383,110.97 was shown as a liability and Yen 45,625.46 as an asset (making a net balance of the amount as shown in the books, Yen 3,337,485.51). We have dealt with this item as follows:

Credits added to Sundry Creditors:

Taxes	\$236,391.20
Claims	18,501.32
Differences in Bank Account between passbooks and ledgers.....	27.60
Liabilities disclosed and paid since 31st December	18,196.66
	<hr/>
	303,316.78

Credits deducted from sundry debtors.

Reserve against Horii Tatsujiro's debt... 2,000.00

Credits added to balance due to other
offices of the Company.

Exchange adjustment on New York financing account.....	47,134.13
---	-----------

Exchange adjustment on New York current account	50,736.33
--	-----------

Credit stated separately (subject to
deduction shown in debits below).

Balances of invoice book, profits on unsettled items	2,979,923.73
---	--------------

Total suspense credits per your bal- ance sheet	Y3,383,110.97
--	---------------

[68]

Debit Balances added to
Sundry Debitors.

Kobe Debit Note, Freight on steel awaiting reply from New York	196.12
--	--------

Debtors disclosed by cash re- ceived since 31st Dec. 1918.	7,610.12	7,806.24
---	----------	----------

Debit Balance added to Stock
Inventory:

Fire Insurance premium to be charged Kahn materials..	3,834.16
--	----------

Rents for godown ditto	1,682.00	5,516.16
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Debit balances deducted from
separate item for reserved
profits on unclosed trans-

actions (see credits above
of Y2,979,923.73).

Interest to be charged.....27,000.00

Storage to be charged.....	5,303.06	32,303.06
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Total Suspense Debits per your Balance Sheet.....		45,625.46
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An item of Yen 7,241.76 placed by you amongst sundry debtors being temporary overpayments, due to remitting round amounts, we have deducted from the balance due to London Office to which these payments relate.

We have verified by examination of Bank Pass Books or Bank Certificates the balances of the sixteen various bank accounts at 31st December with the exception of the item of Yen 37.60 referred to on the previous page. We have examined the balances in the personal ledger of sundry debtors, which agree with the list and with the total in the balance sheet. As to the value of these we would draw attention to the following:

Personal Ledger, Folio 100, T. Shinohara 1,080.66 old and stagnant. *Folio 310, Tokyo Kashi Kikaisha* 119.18, represents an old account of 2,581.03 less paid in January and March, 1918, 2,461.85, leaving 119.18 of which 52.27 [69] has been reversed in January, 1919. *Folio 138 Tokyo Tansan Gas Company*, 6,787.00 no change since May, 1918.

We have seen the script of the shares in the International Trading Company. As regards Bills Re-

ceivable, Y953,078.10 on the balance sheet, the following shows the position:

Asano Cement Company promissory
notes..... 653,994.90

Of these we have actually seen 24 notes
falling due in 1920 or 1912 totalling. 468,083.76

And have traced as discounted with the
Bank or collected in cash received
9 notes falling due in 1919 totalling 185,911.14

-Y653,994.90

Tohoku Itagami Kaisha, two bills due
30th Aug., 1919, which we have
seen in hand..... 96,265.48

Other bills, 35 in number, which have
been collected or discounted, and
for which we have traced the cash
in 1919..... 202,817.72

Y953,078.10

We have had every assistance from Mr. Mauger,
Mr. Steele and your staff, and have been supplied
with all the information we have required. We
are, dear, sirs,

Yours faithfully,
(Sgd.) HAROLD, BELL & TAYLOR,
Chartered Accountants. [70]

Plaintiff's Exhibit "F."

March 10th, 1919.

Accountants.

D. H. Blake, Esq.,

Account Sales.

Vice-pres. & General Mgr.

Dear Sir: I have passed the accompanying account sales and the statements and credit notes based upon them, which are attached thereto, despite the fact that the accounts of invoices they cover have not been similarly completed and closed in our invoice ledger, the foundation of our account sales.

I took the liberty of calling your attention to this situation last Saturday and your reply that "the O. K. of the department head is sufficient" limits my responsibility in this connection by shifting the burden on to the shoulders of each department head.

This is entirely satisfactory to me, if it is to you, and I have signed these various statements to H. O. accordingly.

Faithfully yours,

ATS/AS

(Sgd.) A. T. S. [71]

Exhibit F.

STATISTICAL ABSTRACT OF CUSTOMERS OUTSTANDING ACCOUNTS Feb'y. 28/19.

Summary.	Current.	30 d/s. old.	60 d/s. old.	90 d/s. old.	4 m/s. old.	Prior.	Total.
Import Dept.	398,547.99	94,627.52	97,894.26	64,249.44	7,940.98	38,765.04	702,025.23
Eng.	596,873.35	1,529,349.70	148,994.70	263,505.31	156,335.39	1,563,628.62	4,258,687.07
Building	8,248.57	28,516.17	48,878.82	24,486.98	24,132.30	95,351.79	303,853.63
Traffic	3,002.11	16,573.76	3,705.33	3,119.13	1,654.84	18,258.33	46,313.50
Total	Y 1,080,911.02	1,669,067.15	299,473.11	355,360.86	190,063.51	1,716,003.78	5,310,879.43

STATISTICAL ABSTRACT OF CUSTOMERS OUTSTANDING ACCOUNTS March 31/19.

Summary.	30 d/s. old.	60 d/s. old.	90 d/s. old.	4 m/s. old.	Prior.	Total.
Import Dept.	203,792.66	60,789.69	55,770.18	21,065.07	35,955.00	377,372.60
Eng.	404,394.07	1,602,346.49	142,714.58	70,319.10	1,621,409.67	3,841,183.91
Building	87,874.82	25,457.30	18,179.09	10,181.15	222,406.09	364,098.45
Traffic	2,820.57	16,496.36	4,055.63	2,768.83	19,226.65	45,368.04
Total	Y 698,882.12	1,705,089.84	220,719.48	104,334.15	1,898,997.41	4,628,023.00

AMERICAN TRADING CO.

(Sgd.) A. T. S.,

Acting Accountant. [72]

April 12, 1919.

Mr. D. H. Blake,

Vice-president and General Manager,

American Trading Company, Tokyo.

Dear Mr. Blake: I am sending you herewith a statistical abstract of our customers' overdue accounts (all departments) as of March 31st, 1919,—particulars of same having been sent to the respective department heads for their attention.

You will observe that the aggregate amount outstanding reaches a total of Y4,628,023, not counting our deliveries during the month of March, which amounted to Y1,848,602. A complete analysis of these outstanding accounts has not been prepared as yet, but assuming, for purposes of this letter, that one-third of this huge total, namely Y1,542,674, is composed of accounts in suspense or in process of adjustment, there still remains the tremendous total of over Y3,000,000 overdue. Of this large total, Y1,898,997.41 is over four months old, Y104,334.15 four months old; Y220,719.00 three months old; and the balance practically two months old.

As you are aware, the collections of the Engineering Department have been very slow during the past four or five months, and that will largely account for the big percentage of overdue accounts against the Engineering Department, namely Y3,841,183.91—equivalent to 83% of the grand total. [73]

This large percentage of deferred payments on Engineering Department indents can be readily explained, when you consider the nature of the goods

handled by that department, namely, machinery, tools, implements and mechanical appliances of all kinds. The shortage of a part or parts of machines or the non-arrival of some essential portion of an order may hold up settlement of an account indefinitely. This is one reason why our Engineering Department collections are in arrears. Another reason is lack of special organization for collection work.

When you place along-side of this huge total of collectible accounts outstanding, namely, Y4,628,023, the total amount of our loans outstanding, including over-drafts, namely, Y1,550,000., money we have borrowed locally at high rates of interest in order to retire drafts, and for special finance purposes—also the total amount of drafts maturing in March and April that we had to renew for lack of funds, namely Gold Dollars \$257,437.00 (goods arrived) not to mention customers' promissory notes that we were obliged to discount at rates averaging 7% to meet our current liabilities, nor the amount of our borrowed capital for which we are paying New York office 6% interest, these comparative figures compel attention.

In this connection, may I not suggest the advisability of separating the financial end of the business from the selling end. Our department heads are practically sales managers in this office. [74]

The supervision of orders, the task of business getting, the selling of goods and keeping posted on market fluctuations in the various lines that the Company is interested in seem to me to be their most

important functions—far more so than accounting and collections—and to saddle these heads of departments with bookkeeping and statistical work, when their time and attention is so fully occupied with the executive end of their respective departments, would tend, and does tend, so far as I have observed, to the performance of their duties in this connection in a mechanical manner, such work being entrusted to native clerks, whose O. K. goes.

I would suggest, therefore, to free the executives for their more important tasks in connection with the productive end of the business, and to relieve them of the purely accounting end. Credits, Collections, Accounts and Statistics usually go together in a modern business establishment, and this has proved to be, not only a most economical arrangement, but a most efficient one, making, as it does, for accuracy and concentration—and I am sure our department heads will agree with me when I say this.

This re-arrangement, if carried out by you, would necessitate the organization of a new department, which may be called the “Financial Department,” and I would suggest that our Mr. Boyd be appointed manager of that department, with the Cashier, Credit Man, Collectors, Customers’ Ledger Keeper and other clerks under him, to take charge of the finances of the Company and be responsible for the proper handling of the same. [75]

In co-ordination with the Financial Department and the other departments there would be a department of Audits, Accounts and Statistics, whose work would be to take charge of the invoice ledgers,

account sales and general ledger, Journal and Stock books, check up and verify all matters of accounts, after they have passed through the Financial Department, to prepare the monthly statements for the head office, and to furnish to each department head statistical information relating to the business of his department, to enable the heads of those departments to intelligently follow the growth and development of their business.

Of course, a number of new forms would have to be introduced to give effect to these changes, to the end of simplifying the work and properly coordinating each section of the present Account Department so as to produce the results aimed at—and Mr. Mauger, who has had a considerable amount of experience in accounting in the head office, Mr. Boyd, who is familiar with local conditions and details of the work to be done, and myself, who has had years of experience as a Public Accountant, Auditor, Systematizer in California, can collaborate and work these forms out one by one and have them gradually installed, until the whole system has been carried into effect.

In conclusion, permit me to say that you would be rendering the Tokyo organization a distinct service if you would see this re-organization plan through before you leave here. We have a very fine body of men, capable, alert and wide awake, at the head [76] of each department, and all they need is freedom to develop their own respective lines, without being distracted by responsibilities that do not really belong to them—and I hope that my sugges-

tions will be received in the spirit in which I have offered them, that is to better serve and safeguard the interests of the Company.

Awaiting your decision in the matter, with the keenest interest,

I remain,

Respectfully,

AMERICAN TRADING CO.,

A. T. S.,

Acting accountant. [77]

THE OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED.

October 28, 1918.

The American Accounting Co.,

704 Market St.,

San Francisco, Calif.

Mr. Arthur Tilton Steele, aged 46, of San Francisco, Calif., has requested this Corporation to guarantee his honesty while employed as Chief Accountant by American Trading Co., at Shanghai, China, and as it appears from his application that he was employed by or under you as Manager at San Francisco, Cal., from Jan., 1909, to July, 1918, will you kindly furnish us with answers to the following questions?

Thanking you in advance for your prompt attention, we are,

Yours very truly,

THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED.

(Regular form of questions, but with no answers filled in, follows.) [78]

April 10, 1919.

Accountant

Mr. G. N. Mauger,

New Instructions Issued to Traffic Dept.

Dear Mauger: I understand that these new instructions issued to the Traffic Department relating to the Building Department charges are in force from to-day.

As you know, the old O-2230 account was treated as a huge perpetual invoice—all sorts of charges for labor, materials and supplies being dumped in without classification or order of any kind, and it was impossible to check up the same with the Inventory taken of Kahn materials by the Traffic Department on December 31st, 1918.

You have known of this state of affairs having existed long before I came here. The remedy was pointed out by me more than once, namely proper sectionalization of the stock and invoice accounts, and carrying out the same principle in every section of the Accounts Department. On about February 8th you and Moss got together without consulting me at all, and adjusted this old O-2230 account, apparently, to your mutual satisfaction, and certain journal vouchers were passed in by you over my head, and I was asked to see them through.

I caused a new stock ledger to be opened embodying these new KO/ accounts—so that the Building Department stock accounts may be kept distinct and separate from other invoices, and I thought the move, though belated, was a good one. Since then, however, from time to time the Traffic Department has found it difficult to decide just what items of

expense (for supplies or labor) should go to the KO/ accounts (stock) and what should be charged to jobs. Exhibit G. [79]

I tried to make it clear to Hall in my letter to him dated the 12th of March, a copy of which I read to both you and Moss. It would appear that the point of divergence between Moss and myself in regard to these Traffic Department charges is in connection with the direct charges to jobs (for labor, shearing, cutting, etc., as well as supplies). The rest I agree to, because it is an earnest attempt to apply a remedy long left necessary by me.

I contend with all deference to your opinion that if you assent to my proposition that all items of "supplies purchased directly for orders and freight, cartage and any other similar charges directly applicable to individual orders" should be charged to such orders, then, logically speaking, you must include "labor" in the same category,—labor for shearing, cutting, etc., to meet specifications, of individual orders, is a direct charge upon the job. Any system expert will tell you that, and I might mention here that I have installed systems in over twenty different lines of business in San Francisco, including some factories, and I know what I am talking about.

Of course, Moss' claim that his transfer prices include a certain margin to cover handling charges, etc., may be taken for what it is worth. To me it is just an assumption for as yet it has not been substantiated in the books, and unless and until

a thorough investigation of the Kahn Materials account for 1917 and 1918 is undertaken that claim of Moss' will remain, so far as I am concerned, a statement not based on any proved facts or figures.

The same may be said of the Proforma statement of accrued estimated profit on Kahn Material stock during 1918—first stated to be over Y450,000, then reduced by price [80] manipulations to Y118,000. Later raised to Y124,000, and now still further reduced by the latest journal voucher to Y110,582. How many more journal vouchers like this will emerge out of this old O-2230 account to still further consume this so-called profit is more than I can tell.

Regarding these new instructions, you will please understand that I shall pass all cash orders and journal vouchers relating to the old O-2230 account as well as the new KO. accounts with the understanding that I do so upon your responsibility and not mine.

Yours very truly,
AMERICAN TRADING CO.

A. T. S.
Acting Accountant.

ATS/CP. [81]

April 24, 1919.

Mr. L. A. Ward,
Vice-President and General Manager,
American Trading Co. (Pacific Coast).
San Francisco.

My dear Mr. Ward: I am just informed that Mr. Boyd will be here on Monday next; and I shall have

to hand over charge of the Accountants Dept. to him on the first of May.

I expect the Auditor's report any time now and judging from what Mr. Bell has told me, I believe that his firm will not certify to the correctness of the accounts as of Dec. 31, 1918, except in a modified form, unless and until a thorough investigation of the accounts of the Building Dept. has enabled him to verify certain stock balances carried forward to 1919.

Such an investigation would entail a great deal of time, labor and expense, and I have my doubts as to whether Mr. Blake would deem it advisable to incur the expense, particularly at this time, when he is busy organizing a new company to take care of the "Truscon Building Material" interests as a separate concern.

I can fully realize the inexpediency of going into the accounts of our Building Dept. at this time, as any trouble which may arise out of the investigation might perhaps prejudice the interests of the Company in this new enterprise. Be that as it may,
Exhibit H [82]

I am sure that were the actual facts in their entirety relating to the accounts of the Building Dept. known to the head office they would agree with me that an investigation was very necessary in this connection.

Mr. Blake remarked to me when I called his attention to the facts that the Kahn Materials stock had never been verified and that Account Sales were made up and passed into our books upon the O. K.

of Mr. Moss that Mr. Moss practically fixed the profit on each job, and thereby his commission as well, the Accountant having no authority to question or to supervise his figures that "such a situation would be positively alarming" were it not for the utmost confidence he had in Mr. Moss' integrity and knowledge of the business."

I have not completed my special report to Mr. Blake on the subject of the existing conditions in the Accountant's Dept., and I feel from the way he has treated my suggestions in regard to collections, that it would be labor lost were I to continue my efforts in that direction—and I am the more moved to this conclusion after a conversation which I had recently with Mauger. This being so, I shall probably go to Shanghai, and shall await your advice there instead of here—unless, of course, after Mr. Boyd's arrival here I see a disposition on the part of Mr. Blake to carry out my suggestions to the end of utilizing my services in the Tokyo office for at least the period covered by my contract with the Company. [83]

That the Tokyo Accountants Dept. needs to be re-organized upon a modern basis is admitted by Mauger—he says in this connection that he and Boyd have been *talking about it* ever since he came here from the Philippines in 1917—but from the time I have been here both Mr. Blake's and his attitude has been to defer any action to the end of improving conditions in the Accountants Dept. until Mr. Boyd got back—and now that Mr. Boyd will soon be here, I expect that Mr. Blake will tell me

that these improvements can be effected by Mauger and Boyd, without having another high-salaried accountant to collaborate with them.

Upon this point I shall have something to say, and it is possible that what I will say may not be entirely acceptable to Mr. Blake or to Messrs. Mauger and Boyd,—but I want to assure you that whatever I might say or do in this connection will be prompted by only one thought, actuated by only one motive—that is to better serve and safeguard the interests of the Company than they have been in the past over here.

Each department head here appears to have a separate organization as if those departments were distinct enterprises or concerns, subsidiary to the parent organization in New York but operating independently, as it were, of each other; The Accountants Dept. of the Company being used merely to record their transactions, to receive and disburse moneys, borrow funds to carry on the business, to retire their drafts, to investigate the financial standing of their customers, and to hold in their behalf [84] the securities deposited by those customers, without, however, any right, title or authority to look into the affairs of their respective departments.

This arrangement often causes confusion between the Accountants Dept. and the other departments. For example, the other day a check for about Y9000, came in by registered mail, and was handed over to me in the usual course to our credit man, who went with it to the department where it belonged to get the requisite Dept. memos, for purposes of record

and receipting, and the check was duly deposited on that day. Two weeks later the head of that department comes in to me and says that in response to a request for settlement from the same customer he was informed that payment had already been made, and he did not know anything about it.

This sort of thing happens very frequently, due to the fact that there is not a proper co-ordination of functions between the Sales Managers' Departments and the Accountant; and too much duplication of records, too much unnecessary clerical work done by the departments concerned, when the Accountants Dept., if properly organized, could handle everything in the Accounting line to the entire satisfaction of all departments concerned.

I am merely touching upon the general conditions existing; to go into details with you would be a voluminous task, and furthermore would necessitate your being here to see things in operation—and if you were here, you, or any keen up-to-date American business [85] man, familiar with American methods, would be forced to come to the same conclusion as I have.

Hoping to hear from you in answer to my letters of last month, before I leave here, which will be by the first boat I can secure passage on to Shanghai,

I remain,
Very sincerely yours,

ATS/CP. [86]

April 17, 1919.

Mr. L. A. Ward,

Vice-President and General Manager,
American Trading Co. (Pacific Coast),
San Francisco.

My dear Mr. Ward: Since addressing you last there have been no new developments to advise you of.

The conference with Messrs. Bell & Taylor took place some days ago, and they are apparently still considering matters, for their report and statements are not forthcoming as yet. As soon as they come to hand and Mr. Blake is made aware of the actual conditions existing I shall make my special report to him and await his decision.

Perhaps the enclosed clipping may be of some interest to you, and I might mention that I am doing considerable writing for various newspapers and magazines both in California and here in Japan, and I have spoken to Mr. Blake on the subject and he thinks that there would be no objection to my doing this provided I did not sign my name to those writings—and I have agreed with him that this would not be advisable, in view of the fact that the ideas which I have expressed and shall express while I am in the Orient may prove very unpalatable to the average oriental man. [87]

As regards Mr. Boyd's return, nobody here knows just when he is coming back—but I suppose before he leaves San Francisco he will see you, and you will know exactly when he is leaving.

Awaiting your advice with much interest, I remain,
Yours very sincerely,

ATS/CP [88]

American Trading Co.
(Pacific Coast)

224 California Street,
San Francisco, Cal.

Sept. 26, 1918.

Mr. Arthur Tilton Steele,
C/O American Trading Co.,
Tokyo, Japan.

Dear Mr. Steele: I acknowledge receipt of your letters dated August 21st and 30th, which I have read with much interest.

You are having a rather extraordinary trip to Shanghai. You will doubtless be pleased to spend a few months in Japan.

At the request of Mr. Blake I am sending him a copy of our letter of employment with you, also copy of my letter to Mr. Burns re same, so that he will be fully seized with our arrangement.

I do not recollect just what arrangement was made between Mr. Burns and yourself regarding exchange, but doubtless both you and Mr. Burns do.

The arrangement you have made with Mr. Blake should enable you to save considerable money, unless you pay for your living expenses more than I would judge from my experience in Japan last year there would be any occasion for you to do.

You will have to take up the question of settlement of the \$250.00 advanced with Shanghai office. I

daresay Shanghai office will let the matter rest until you reach Shanghai. [89]

Of course, it is not a proper thing for me now to say what should be done in this connection. All this you will appreciate I am sure.

I am pleased to hear that you expect to be married soon. In many ways it will make life much more possible for you in the Orient,—from an economic point of view as well as socially.

With best wishes,

Very truly yours,

LOUIS A. WARD.

LAW/V

Read Oct. 25, 18. [90]

American Trading Co.

(Pacific Coast)

244 California Street,

San Francisco, Cal.

August 19, 1918.

Mr. Arthur Tilton Steele,

C/O American Trading Co.,

Shanghai, China.

Dear Mr. Steele:—I was pleased to receive your note of August 9th advising your safe arrival on board the SS “Kashima Maru.”

Your things have been received in our store room in our basement where they have been crated and Debit Notes for cartage and crating have been forwarded to Shanghai office.

As I, find time, from time to time, I shall have pleasure in writing you regarding some personal matters of which I talked with you. Of course, I

shall be glad to hear from you, personally, whenever you have the leisure and the spirit moves you to write to me.

Sincerely yours,

LOUIS A. WARD.

LAW/V [91]

The Ocean, Accident & Guarantee Corporation, Ltd.

Head Office:

36 to 44, Moorgate St.,

London e, c, 2.

26th November, 1918.

A. Tilton Steele, Esq.,

c/o American Trading Company,

Shanghai, China.

Dear Sir: Your application has been forwarded to us. We notice that apparently prior to accepting your present engagement you were in business on your own account. We attach the usual form for completion under such circumstances and await your further advice in due course.

Yours faithfully,

F. M. E. ARMSTRONG,

Manager & Secretary.

JES/OAK

Replied Jan. 27, '19. Exhibit J. [92]

Jan. 27th, 1919.

Messrs. The Ocean Accident & Guarantee Corpora-
tion Ltd.,

36-44 Moorgate Str.,

London, E. C. 2.

Gentlemen:—

Attention of Mr. T. M. E. Armstrong.

Your favor of Nov. 16 '18 addressed to me c/o our Shanghai Office has just come to hand, & I hasten to reply, so that the matter may be placed before you for final disposal without undue delay.

I have filled in the Answer to questions on the form herein enclosed & trust you will find same entirely satisfactory: should you need further references, as to my reputation and standing, during the two periods of *of* my professional career in Los Angeles & San Francisco respectively I would add the names of the following gentlemen—

Los Angeles 1905-1908.

Judge F. R. Willis—Judge Superior Court Los Angeles. Jos. R. Phillis, 128 So. Albany St. Huntington. Park—Cal. U. S. A.

San Francisco Cal. 1909-1918.

E. W. Wilson, Vice President Anglo & London Paris, National Bank, San Francisco, L. K. Smith c/o Harry Green & Co. Inc. Importers & Exporters 216 Pine Street San Francisco. J. B. Thomas: c/o Northwestern Mutual Life Insurance Co. San Francisco. If I remember aright I gave in my original application at least 5 references— [93]

Messrs. The Ocean Accident & Guarantee Corporation Ltd.

1. Clarence M. Smith, Banker & Capitalist.
2. Edwin J. Thomas: General Agent.
3. Charles A. Murdock. Printer and Publisher.
4. Robert H. Swayne: Steam-Ship Agent.
5. Reynold E. Blight M. A. C. P. A. Los. Angeles.

Hoping that this will complete the case, for your final decision, I am

Faithfully yours,

ATS/AS [94]

Jan. 27th, 1919.

Messrs. The Ocean Accident & Guarantee Corporation Ltd.

55 John Street,
New York.

Gentlemen:—Your form 47ff/63724 dated Oct. 28 '18 addressed to the American Accounting Co.—704 Market Street, San Francisco, was re-directed to the Shanghai Office, of the American Trading Co.—whence it was forwarded to me here—hence the delay in responding thereto.

As regards filling in the answers to the questions in the aforesaid form, if I remember aright, I stated in my application that I was the Managing proprietor of the American Accounting Co.—under which name & style I practiced as a public accountant and auditor, in California since 1905, this being so it is obvious that the answers required cannot be furnished by me.

However I enclose herewith a copy of the form I have filled in, signed & returned to your Head Office

in London, in compliance with their request. I also enclose a copy of my covering letter to them on the subject for your further information.

Hoping that this will complete the case for final disposal, I remain

Yours very truly

ATS/AS [95]

The Ocean Accident & Guarantee Corporation Ltd.
Moorgate Street,
London, 26th, Nov. 1918.

Re your Proposal for Guarantee £2,000.

Note of further particulars required for the information of the Board of Directors.

Mr. A. Tilton Steele.

QUESTIONS.

1. The full address at which you formerly carried on business.
2. The exact nature of the business.
3. The date upon which you started.
4. The date upon which you gave it up.
5. Your reasons for giving it up.
6. Have you any debts in connection with it?
7. Full name and present address or last address known to you of any partners.

ANSWERS.

Suite #1011-12 (10th floor) Mutual Savings Bank Building, San Francisco, U. S. A.

Public accounting, auditing, Systematising.

In Los Angeles, Cal., June, 1905.
In San Francisco, Cal., Jan. 1909.

July 1, 1918.

To find in the Orient better opportunities for advancement, along mercantile rather than professional lines.

No.

Los Angeles Associate, Reynold E. Blight M. A. C. P. A. Los Angeles, Cal., Hibernia Bldg., or Security Bank Bldg., San Francisco.

No partners only assistants. Refer to Clarence M. Smith, Banker. 704 Market St., San Francisco, Cal.

N. B. I expect to leave Tokyo

office, where I am now, Act-

ing Chief Accountant—to

take up my position of Chief

Accountant, Shanghai OfficeSignature.

early in April '19. Kindly Date Jan. 25, '19.

expedite matters & Oblige.

[96]

Receipt for Registered Articles.

Received ——— Packets mentioned below for
Registration from American Trading Co., Tokyo,
Japan.

No. of Order.	Registered Number	Name of Addressee.	Destina- tion.	Post- Class.	age.
	A				
1	867	Ocean Accident	London	Y	0.20
		Accident & Guarantee Co.			
2	868	do	New York		0.26

Kiyo Maru,

J. C.

Total 2.

Registry Clerk. [97]

Feb. 17th, 1919.

W. A. Burns Esq.,

Shanghai,

Dear Mr. Burns:—I suppose you got my card, which I left at the Grand Hotel Yokohama on Sunday the 3d inst., after I had waited for you 3 hours—a dinner engagement at Toko, prevented me from waiting till you returned—and your leaving early the following morning knocked on the head all hope I had of meeting you while you were here.

It appears Messrs. Paget & Budell left the office early on Saturday especially to meet you—but failed to tell me or even to remember that I would naturally wish to see you—the Head of our Shanghai Office.

Mr. Boyd our Chief Accountant sailed for San Francisco, on the 12th. inst., the poor fellow had a nasty accident in Kobe, which laid him up for months, and he has only now been able to go on his vacation. Mr. Blake tells me that he will be back by the end of April.

I might observe that the few months I have been here have been valuable experience, and I feel so much better equipped for the Shanghai job, now that I have become familiar with the Company's system and methods.

May I enquire when Mr. Manley's agreement expires if my memory serves me right—you mentioned May 1, '19 when I saw you in San Francisco. [98]

Exhibit KI.

Please have no mis-givings as to my ability to take hold of things right way.—rest assured that I shall have complete control—of the work of my department, within a week.

Assuring you of my sincere regret at missing you at Yokohama,

ATS/AS.

I am, Faithfully yours. [99]

Tokyo Club,

Tokyo.,

March 12 '19.

Dear Mr. Burns:—I wrote you a letter soon after your departure from Yokohama, and as I have not heard from you in reply, I am writing to inquire if you received it.

As I expect my intended to be out here about the

middle of next month, and we have planned to get married, and go together to Shanghai, I am naturally anxious to know just when I must report at Shanghai Office.

If you have not already advised me on this point I shall feel much obliged if you will let me know at your earliest convenience.

Assuring you of my loyal and earnest co-operation in the service of the Co. as long as I am working under you,

I remain,
Faithfully yours,
A. TILTON STEELE.

W. A. Burns Esq.
Shanghai.

Returned to me by Mr. Blake, Mar. 28th—No reply from Mr. Burns received as yet. [100]

Exhibit K "2

March 12th 1919.

Messrs American Trading Co.,
San Francisco, Cal.

Dear sirs:—

Attention of Mr. L. A. Ward.

This will serve to authorize you to pay to Mrs. Margaret M. Cosgrave or order up to two hundred and Fifty dollars (C. \$250.00).

Kindly send your debit note for any amount drawn against this credit to this office, charging account of Mr. A. T. Steele.

Thanking you in advance for your kind attention.

Faithfully yours,

American Trading Co.

Acting Accountant.

ATS/SI.

Exhibit I.

[101]

March 19, 1919.

D. H. Blake, Esq.,

Vice-president & General Manager,

American Trading Company, Tokyo.

My Dear Sir:

Re My Three Year Contract With the Company.

Replying to your letter of yesterday's date, I beg to confirm the understanding we came to at the close of my interview with your good self yesterday on the above subject:

That I did not feel disposed to come to any final decision in the matter without consulting Mr. Ward, who, with the knowledge and assent of Mr. Burns, made the above-mentioned contract with me.

While I deeply appreciate your offer of mediation and was sincerely confident of receiving the fullest consideration at your hands. I could not make up my mind on the subject without first hearing from Mr. Ward.

Your concurrence with me on this point made the situation so much easier for all concerned, and I am sure I left the impression with you that I had concluded that I was determined in fact to have this unfortunate affair with the Company adjusted in an amicable rather than a contentious spirit.

Since writing the above I have received a copy of your letter to Mr. Ward, 46-F, which was addressed to him by you in keeping with our conversation.

Would you permit me to make clear a passage [102] in that letter which is somewhat ambiguous. I refer to the part wherein you say that "Mr. Steele is not altogether satisfied with life in Japan and that he is not sorry that his stay here is not to be prolonged."

This may be construed by Mr. Ward to mean that I am not in favor of serving the Company in Japan. With your kind permission I would like to state briefly what I have already told you in this connection, that I had reference to my *business life* in Japan, as a member of the Tokyo organization of the Company *under existing conditions*. Those conditions, as you are aware, tend to make the accountant of the Tokyo Office virtually, if not verbally, subordinate in matters of accounting to the other departments—Import, Engineering and Building—a situation which in my opinion no self-respecting experienced American Accountant could endure for any great length of time.

However, this is not the time for details—suffice it to say, and I sincerely trust you will take what I say in good part, that in matters relating to accounts and collections (not to mention anything else) our office wants to be thoroughly reconstructed, i. e., reorganized along modern lines, to meet the needs and requirements of the coming post-war

competition that other large organizations like ours in Japan are preparing for.

Of course, Japan is not America—we all realize that, and local conditions will have to be met, but the science of Accounting, as practiced in the United States to-day, is based on “Common Sense,” and an expert accountant trained in the United States School of Practical Accounting, no matter where he goes or what business [103] he is engaged to serve, may safely be trusted to find a practical solution to every problem that arises in his line—*if he be given the requisite authority and encouragement to operate in his particular field of work.*

I trust my special report, when it is completed, will prove of sufficient merit to receive your endorsement, and I need hardly add in this connection that the approval of a gentleman of your wide business grasp and experience would be highly valued by me.

Very respectfully yours,

ATS/CP.

1. Sent copy of this letter to Mr. Ward, 3/19. Also wrote him briefly on the subject.

2. Wrote L. A. W. again about it on Apr. 4, -19.
[104]

March 19, 1919.

Letter No. 46—F.

L. A. Ward, Esq.,

Vice-president American Trading Co. (Pacific
Coast)

San Francisco, California.

Dear Mr. Ward:

Mr. A. Tilton Steele:

I enclose herewith copy of letter which I have to-

day addressed to Mr. Steele.

You will perhaps not be prepared for the news that Mr. Steele is not going to Shanghai to our office at that port. I presume that when Mr. Burns went through San Francisco this matter was not discussed with you, because Mr. Burns thought at that time that Mr. Steele would replace Mr. Manley after the return of Mr. Boyd to Tokyo from his short holiday. In the meantime Mr. Burns has made satisfactory arrangements with Mr. Manley, and desires to continue his services with the Company—and that being the case, he has no position for Mr. Steele.

I have explained the whole situation to Mr. Steele, and I think he fully understands the reason for the action which has been taken. I am pleased to say that he has accepted the situation very gracefully indeed and is quite willing to come to a friendly understanding with the American Trading Company.

I have suggested that in view of the fact that his contract was made with your good self, he return to San Francisco in due course and come to a settlement with you, and he has been very agreeable to this suggestion.

Exhibit M. 3.

[105]

I think I am correct in saying that Mr. Steele is not altogether satisfied with life in the Far East, and that he is not sorry that his stay is not to be prolonged even to the extent of the contract which he entered into. He is, however, desirous of obtaining some kind of a government appointment in

India, and he tells me that you were fully acquainted with his wishes in this respect at the time you entered into negotiation with him on behalf of the American Trading Company. He would like us to render him such assistance as we can to enable him to get such an appointment, and I have told him that we would provide him with such letters of recommendation as we could, but beyond that I cannot see that we can be of any material assistance. However, I hope that you will do anything that you are able to do in his behalf.

I cannot say at this writing just when Mr. Steele will return to San Francisco, but I am expecting that Mr. Boyd will be back here not later than the end of April, and in that case probably Mr. Steele could get away from here some time during May.

I am giving Mr. Steele a copy of this letter.

I remain,

Very truly yours,

DHB/CP

Enclosure. [106]

P. S. Since writing the above, Mr. Steele has called my attention to the fact that my remarks with reference to his not being satisfied with life in the Far East are not exactly in accordance with facts. His position is that he is not pleased with life in Japan, but that as far as China is concerned, he believes that he would have been entirely satisfied to have completed his contract in that country. [107]

D. H. B.

April 30th, '19.

Mr. D. H. Blake, Vice-president & General Manager, Tokyo Office.

Dear Mr. Blake: With due deference to you as the Head of our Company, allow me to point out to you that there are three matters still in abeyance upon which I have not as yet learned your decision. First, Building Department Stock Muddle.

In view of the facts that our Auditor's Report dated Sept. 26, '18, covering their audit of our accounts as of June 30, 1918, makes no mention of this condition, and as I have been in charge of the Accountant's Department since October last, and the same condition existed when I took over charge from Boyd, and during the past few months I have made repeated efforts to straighten out the muddle, without however receiving any support either from your good self or from Messrs. Mauger and Moss, I feel that I ought officially to be exonerated from any blame or responsibility in the premises.

Re Thorough Examination of Our Kahn Materials Stock a/c (0/2230).

As I am of the same opinion as Messrs. Harold Bell & Taylor within regard to the adjustment of this account in our Invoice ledger, in fact had advocated the same procedure more than once, and do believe that the right way to ascertain the actual results of the dealings of our Building Department during this period 1917-18 is to go over this old 0/2230 a/c from October, 1917, if not earlier, so as to [108] take into the main books the actual

profit (or loss) accrued through Contracts, on stock, which has never been done.

May I not know whether or not you are in accord with me on this point?

(Re Improvements in the System of Accounts & Collections.

May I know definitely if the suggestions embodied in my letter to you dated April 12, 19, are approved by you, and whether or not it is your desire that I should remain in the Tokyo Office to co-operate with Messrs. Mauger & Boyd in the proposed changes.) Your decision on this point has not been made known to me as yet.

As these are matters that concern my association with the Accountant's Department and should be decided by you before I may properly be called upon to deliver the Keys of my Office and make over charge of my department to Mr. Boyd, I trust you will be good enough to advise me on the points herein stated and thereby oblige,

Yours faithfully,

AMERICAN TRADING CO.

A. T. S.,

Acting Accountant. [109]

AMERICAN TRADING COMPANY.

I, Yurakuche Itchome Kojimachiku,

Tokyo, April 30, 1919.

A. Tilton Steele, Esq.,

Acting Account.,

American Trading Co., Tokyo.

Dear Sir: I am in receipt of your letter of even date.

With regard to Building Department Stock, I would say that while I do not approve of your remarks, I do not hesitate to absolve you from any responsibility in the premises. I cannot recall that there has been any suggestion of placing any responsibility on you in connection with this particular account.

I note your suggestion re. the handling of Kahn stock, and thank you for same. I feel sure that we shall find a satisfactory solution of this matter.

(With reference to your letter of the 12th inst., I am keenly interested in your suggestion, but it is quite impossible for me to say at this time whether or not we shall put your suggested scheme into operation.) In any case, I have no intention of creating a special department at the present time for the work in question.

I was not aware that you were awaiting my decision on this point, as I thought it was already understood between us that your duties would terminate simultaneously with Mr. Boyd's return to the office. [110] However, in order that there may be no further misunderstanding I would request you to hand over the management of the Accountant's Department to Mr. Boyd as soon as possible, which you have told me verbally would be to-morrow.

I remain,

Yours very truly,

D. H. BLAKE,

Vice-pres.

DHB/Cp [111]

May 1, 1919.

Mr. D. H. Blake,

Vice-president and General Manager,

American Trading Company,

Present.

Dear Sir: I thank you for yours of yesterday in answer to mine of even date.

If you will be so good as to refer to your letter dated Aug. 30, 1918, embodying the terms of your Agreement with me, you will find that while it was understood between us that I was to hold my position of Acting Accountant until Mr. Boyd's return to the office, that arrangement was conditional upon my engagement in the Shanghai office of the Company in terms of my original contract.

Since Mr. Burns, as you say in yours of March 19, 19, "has made satisfactory arrangements with Mr. Manley to remain with the Company and does not now want me to come to the Shanghai office," I must look to you as Vice-president and the highest officer of the Company in the Orient, to fulfil the terms of your agreement with me which confirmed my original contract with the Company, regardless of Mr. Burn's or Mr. Ward's responsibility in the premises.

I have no desire to thrust myself on the Shanghai office, but since I gave up my practice of Public Accounting in San Francisco to come to the Orient upon the [112] distinct and expressed conditions Exhibit 03.

in my contract that I would receive not less than *Ten Thousand U. S. Gold Dollars* as my cumulative

salary for the entire period covered by my contract and bonuses according to the rules of the Company, and as I am willing, and even desirous of serving the Company in terms of my agreement, I think I am entitled to a reasonable compensation, if you wish to cancel both agreements.

What that compensation ought to be is not for me to state, but in order to bring about an equitable settlement or an adjustment free from unpleasantness, I am prepared to place the matter in the hands of our Ambassador in Tokyo, Mr. Roland Morris, for arbitration.

I trust you will agree with this suggestion and permit me to retain my office till this is effected, or some understanding is reached whereby my interests under my two agreements with the Company are properly protected.

Yours very truly,

AMERICAN TRADING CO.

A. T. STEELE,

Acting Accountant. [113]

I trust that on further consideration you will agree to relinquish your office and give up the keys to the safe and desks at once, and thus avoid any unpleasant consequences. I remain,

Yours very truly,

AMERICAN TRADING COMPANY.

D. H. BLAKE,

Vice-president.

DHB/GI. [114]

May 2, 1919.

H. E. Roland S. Morris,

American Ambassador, Tokyo.

Sir: (In accordance with your kind suggestion, we the undersigned, agree to the Arbitration of our differences by the Honorable Mr. Potter, and undertake to abide by and put into effect whatever award he makes).

We remain, Dear Sir,

Yours very respectfully,

AMERICAN TRADING CO.

(Signed) D. H. BLAKE,

Vice-president.

AMERICAN TRADING CO.

A. T. STEELE,

Acting Accountant. [115]

Exhibit O5.

May 3, 1919.

Mr. D. H. BLAKE,

Vice-president and General Manager,

American Trading Co.,

Present.

Dear Sir: Upon my arrival this morning, according to arrangement, to turn over the notes, securities and other contents of the Company's to Mr. Boyd, I found that my desk had been opened in my absence by Mr. Boyd, with a duplicate key, which he showed me; and this was done without my knowledge or assent.

I think you will agree with me that this action was irregular, and calculated to annoy me needlessly, and whilst I do not for one moment suggest

that any documents were improperly abstracted, I must for the sake of form disclaim any responsibility for the contents of furniture opened during my absence.

Very truly yours,

AMERICAN TRADING CO.

A. T. STEELE,

Acting Accountant.

ATS/CP [116]

Exhibit P. 1.

AMERICAN TRADING COMPANY,

I, Yurakuche Itcheme, Kejimachiku,

Tokyo, May 3, 1919.

Mr. A. T. Steele,

Present:

Dear Sir: We have for acknowledgment your letter of to-day's date in which you state that during your absence Mr. Boyd opened your desk with a duplicate key and to which action you object.

Your action in not coming to the office until 9:45 this morning caused Mr. Boyd to open your desk in conjunction with the Agent of the Company, so that the business of the Company might be carried on. Documents of any value should not be kept in desks but in safes provided for this purpose, and the Agent of the Company has a perfect right to inspect the contents of any employee's desk at any time for the reason that these desks are supposed to contain nothing but Company property, and as

stated above, documents of no particular value.

Yours truly,

AMERICAN TRADING CO.,

G. N. MAUGER,

Agent.

GNM/MRD.

EXHIBIT P2.

[117]

AMERICAN TRADING COMPANY,

I, Yurakuche Itcheme, Kejimachiku,

Tokyo, May 6, 1919.

A. T. Steele, Esq.

5, Enekizaka-machi, Akasaka,

Tokyo.

Dear Sir:—I shall be obliged if you will kindly furnish me with certified copies of all letters which you have addressed to Mr. Ward, during the time you have been connected with this office, which in any way refer to the business of the office.

Your prompt compliance with this request will no doubt hasten the arbitration of our differences, and as that would no doubt be in keeping with your own ideas I hope you will not delay complying with my request.

I would also be glad to have you state to me in writing whether or not you sent to Mr. Ward a copy of our last Auditors' Report.

I have again to remind you that you have failed to turn over a number of keys which are urgently required by us. I understand that the desk in our office for which you hold the key contains only your private belongings, but I would call to your attention that this fact does not offer any excuse for you

retaining possession of our property. Kindly let us have all our keys at once.

I enclose herewith an Account Current showing [118] that you have a debit balance of Y541.21, on our books, which we request that you pay in at once. I remain,

Yours very truly,
AMERICAN TRADING COMPANY.
D. H. BLAKE,
Vice-president.

DHB: McD.
EXHIBIT Q1. [119]

Accountant's Dept.

Tokyo, May 5th, 1919.

Mr. A. T. Steele Personal A/C.

In Account Current with the American Trading Co. Interest at 6% p. a.

	Dr.	Days.	Interest.	Amount.
1918.				
Aug. 27	To, Cash paid, W. W. Baer	251)		(10.00
"	" do "	"	1.13	(17.50
Sept. 30	" Telegram A/C.	217	.03	.90
Nov. 25	" Cash paid, Y. Ikeda	161	.06	2.45
30	" Telegram A/C	156	.31	12.10
Dec. 9	" Cash paid, Standard Oil Co.	147	.45	18.50
6	" D/O.: #4923 I C/—Succotash	150	.31	12.76
	2 doz.			
9	" " " 4958 I C/—Sunflower	147	.40	16.80
	Asparagus			
11	" " " 4998 I C/—Corn Flakes	145	.35	14.55
	3 doz.			

1919.

			Days	Interest.	Amount.
Apr. 14	"	Cash paid, International Bank	21	.64	185.00
24	"	do do	11	.90	500.00
30	"	do A. T. Steele	5	.45	545.42
May 5	"	Balance.....		1.57	
				<hr/>	
				YEN	6.60 1,335.98

Cr.

1918.

Dec. 31	By,	Traveling Expenses A/C.	125	2.86	139.20
Mch. 31	"	Cash.	35	3.74	650.00
May 5	"	Balance Interest A/C at 6%		....	1.57

P. A. to date.

"	"	Balance carried down	v		545.21
				<hr/>	
				YEN	6.60 1,335.98

[120]

May 5	To	Balance brought down (due us)	YEN		545.21
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E. & O. E.

AMERICAN TRADING CO.,

BOYD, Accountant.

Dr. Interest A/C. Yen 1.57) [121]

Exhibit Q 2.

[121]

(Letter press copy.)

Tokyo, May 5, 1919.

Mr. D. H. Blake, Vice President,

American Trading Company, Tokyo.

Dear Sir: I am in receipt of your letter of the 6th inst., just now and regret that I cannot accede to your request to furnish you with certified copies of letters which I have addressed to Mr. Ward which in any way refer to the business of the Company during the time I have been connected with the Tokyo office; such letters as are relevant to the issues between us will be produced by me to the arbitrator, The Honorable Mr. Potter, and you will no doubt receive notices of them in due course. As a matter of fact those letters were taken by the company's stenographer whose note books presumably are available to you for reference.

Referring to para. 3 of your letter under reply I have not sent to Mr. Ward a copy of the auditor's last report.

I have read para. 4 of your letter with some surprise as it was definitely arranged between Mr. Boyd, an officer of the Company and myself, his predecessor in office, that I was to attend at 4 p. m. on Thursday (today) to remove my private belongings from the desk to which you refer, your reference to a number of keys is incorrect. I have two keys only as Mr. Boyd knows, and both of them will be handed to him at the appointed time in return for which I shall expect a clean receipt from the company.

Regarding my account I am putting in a claim

for damages, with the arbitrator and I must request you to hold over this account till the arbitrator has rendered his award.

Very truly yours,

(Sgd.) A. T. STEELE.

Exhibit Q3.

[122]

A. T. STEELE

vs.

AMERICAN TRADING COMPANY

DEFENDANT'S EXHIBITS. [123]

Defendant's Exhibit No. 1.

June 10th, 1919.

Letter No. 893A.

W. A. Burns, Esq.,

American Trading Co.,

Shanghai.

My dear Burns: I enclose herewith correspondence which we have had in connection with the cancellation of this man's contract. I should have sent this correspondence to you some time ago excepting for the fact that I was waiting to get the arbitrator's award, so I could hand the whole thing over to you at one time. The award only came in yesterday, and from same you will note that the decision is that Mr. Steele is to adjust his differences with Mr. Ward in San Francisco.

This is the identical arrangement that I proposed and which I thought was acceptable to Mr. Steele.

I might tell you that he acted abominably at the time I instructed him to turn over his duties to

Boyd, and undertook to make all the trouble possible. I presume I shall still have some further trouble in connection with getting him a steamship passage, because all steamers are fully booked up and none of the lines are keen on booking anyone except for months ahead.

If I could be sure of Steele's co-operation I could do something, but without that it would be very difficult. However you may be sure that I will do the best I can in the interests of the Company, and I hope to get Steele away within the next few weeks. [124]

I have not heard from him since the award was handed in, but I am sure it will be very unsatisfactory to him, because I know he wishes to remain in the Orient, and would like to do so at our expense.

His anticipation was to go over to Shanghai, in which case you would no doubt receive a call from him. He is of course very sore against the company, and would naturally do anything he could to hurt us, but as far as I can see the possibilities in that direction are very limited.

I remain,

Very truly yours,

D. H. BLAKE.

DHB—McD

Enc. [125]

Defendant's Exhibit No. 2.

May 10th, 1919.

Honorable William Potter,
c/o American Embassy,
Tokio.

Dear Sir: We acknowledge your letter of the 2d inst., and wish to express our appreciation of your willingness to arbitrate the differences which have arisen between our Company and Mr. A. T. Steele. We further desire to record our appreciation of the good offices of His Excellency Ambassador Morris, which have resulted in your undertaking this task.

In the beginning we wish to explain that it has never been our intention to evade our responsibilities or disregard Mr. Steele's rights under his contract.

The correspondence submitted will show you that Mr. Steele was originally employed on behalf of our Shanghai office, but later on he was held at Tokyo to assume, temporarily, the duties of Mr. Boyd, while the latter took a short holiday.

In the meantime it developed that Mr. Steele's services were not required at Shanghai, and we at once began negotiating with him for the cancellation of his contract. In view of the fact that he had been originally employed by Mr. Ward in San Francisco, who was a personal friend of his, we recommended that the matter should be referred to him for settlement, and we had every reason to believe that this arrangement would be entirely satisfactory.

You will note that we gave Mr. Steele written

notice that his services with this office would terminate [126] on Mr. Boyd's return to Tokio. He took no exception to the arrangement at the time, and in fact as late as April 29th, he told the writer and Mr. Mauger, the agent of the Tokio office, that he would turn over his duties to Mr. Boyd the following day. This, however, he failed to do, notwithstanding our repeated requests. Owing to his arbitrary and unwarranted actions our business was seriously interfered with for several days.

As an instance of the inconvenience we were subjected to we would say that our accountant's safe remained closed for two days, during which time we were deprived of the use of our securities and other important documents.

During this time we had agreed to Mr. Steele's demand for an arbitration so we contend that there was no ground for his arbitrary and illegal action.

We might point out that Mr. Steele's rights under his contract would have been just as secure without this "hold up" and we feel sure you will agree with this statement.

We would finally put on record that it was not until the 8th inst. that Mr. Steele handed over the last of our keys which were in his possession.

We now come to the character of Mr. Steele's work while he was in this office. He adopted the attitude from the start that our system of bookkeeping was all wrong, and this of course led to more or less friction and unpleasantness.

During the first few months of his stay here his attendance on the office was so irregular as to cause

great hindrance to our business. It very frequently happened that he did not turn up at the office [127] until 9:30 o'clock, sometimes 10 o'clock, or even later—this in spite of the fact that a notice is posted that our office hours are from 9 o'clock.

If required we can offer numerous witnesses to prove the correctness of the above statements.

On three occasions the writer called Mr. Steele to task for his disregard of our office rules, and during one of these interviews we told him that if he found it impossible to comply with our regulations he had better return to San Francisco. Notwithstanding our repeated admonitions he still persisted in ignoring the office rules, and we submit that on this point alone we could have found sufficient justification for cancelling his contract.

We now wish to discuss Mr. Steele's unauthorized correspondence on affairs pertaining to our office.

We enclose copies of his letters of April 17th and April 24th, addressed to Mr. L. A. Ward of San Francisco.

These copies are certified to us by Miss Paul, who was our stenographer at the time they were written, but who has since left our employ. She is, however, still in Yokohama and would be willing to answer any questions if called upon to do so.

Mr. Steele told the writer that he had addressed certain letters to Mr. Ward, but never mentioned their character. He also intimated that he had taken an extra copy for our files, but at the same time never offered to hand them over.

We now have every reason to believe that his apparent willingness that we should see this correspondence was pure camouflage, as it must be apparent to anyone that had we seen the letter of April 24th, it [128] would never have left our office.

Since the beginning of this month we have repeatedly asked Mr. Steele, both verbally and in writing (see copy of our letter of May 6th) for copies of his correspondence with Mr. Ward, but up to this writing he has failed to comply.

We might explain that the addressee of these letters is the Vice-president and General Manager of the American Trading Company (Pacific Coast), a Company with which we are associated, but which is a separate and distinct organization.

Mr. Ward has no jurisdiction over this office and is not even an employee of the American Trading Company proper.

We do not even intimate that Mr. Ward was a party to this clandestine correspondence and we even believe that he will disavow any connection with it.

We do not know how many more letters were written or the nature of their contents, but the opening paragraph of the letter of April 17th furnishes proof that there were others. This paragraph also shows that Mr. Steele was keeping Mr. Ward advised of "developments."

We would also like to call your attention to the first paragraph of the letter of April 24th in support of our statement that we thought Mr. Steele was agreeable to handing over his duties to Mr.

Boyd on the latter's return.

We do not undertake to deal in detail with the balance of the subject matter of this letter, but we might remark that against Mr. Steele eight months service in the Company the men whom he subjects to such severe criticisms and innuendoes have the following records: [129]

Mr. Blake, 23 years, Mr. Mauger, 20 years, Mr. Boyd, 17 years and Mr. Moss, 9 years.

We would further mention that Mr. Mauger, previous to coming to Tokio, was the chief accountant of our company in New York for a number of years, and is, presumably, as capable a man on books as Mr. Steele, and also has the welfare of the Company quite as much at heart.

We submit that Mr. Steele in carrying on such correspondence was practicing both deception and treachery, and on either count he has committed an unpardonable offense.

If he acted with a realization of what he was doing, then certainly he has no excuse to offer, but on the other hand if he pleads ignorance, he convicts himself of being deficient in the most elementary principals of business.

It seems incredible that any man endowed with ordinary intelligence could so abuse the confidence of his employers as Mr. Steele has done in carrying on this correspondence.

We would respectfully submit for your consideration the following points:

1. Would Mr. Steele have been justified in writing such a letter as that of April 24th, even to the

head office of the company, without the knowledge and consent of his superior officer?

2. Assuming for argument's sake that your answer to the above is in the affirmative, would he have been justified in sending the same letter to a man who had no connection whatever with the office which employed him? [130]

3. Having committed this offense has he not proven himself irresponsible and untrustworthy?

4. In view of all the other facts would we not have had good and sufficient grounds for dismissing him from our office?

In conclusion we have to say that under ordinary circumstances we would have had no other thought than to treat Mr. Steele liberally, but in view of the unsatisfactory character of his work and the treachery he has displayed toward his office and employers, we now prefer that the case be settled entirely on its merits.

Respectfully submitting the above, and with renewed thanks for your kind assistance, we remain, dear sir,

Yours very truly,

DHB-McD

Enclosures: Copy of Mr. Steele's contract dated May 27, 1918.

Copy of our letter to Mr. Steele dated March 19, 1919.

Copy of our letter to Mr. Ward, dated May 6, 1919.

Copy of Mr. Steele's letter to Mr. Ward, April 17, 1919.

Copy of Mr. Steele's letter to Mr. Ward, April 24, 1919. [131]

Defendant's Exhibit No. 3.

Tokyo, March 19, 1919.

D. H. Blake, Esq.,

Vice-Pres. & General Mgr.,

American Trading Co., Tokio.

My dear Sir:—

Re. My Three Year Contract With the Company.

Replying to your letter of yesterday's date, I beg to confirm the understanding we came to at the close of my interview with your good self yesterday on the above subject.

That I did not feel disposed to come to a final decision on the matter without consulting Mr. Ward, who, with the knowledge and assent of Mr. Burns, made the above-mentioned contract with me.

While I deeply appreciated your offer of mediation and was sincerely confident of receiving the fullest consideration at your hands, I could not make up my mind on the subject without first hearing from Mr. Ward.

Your concurrence with me on this point made the situation so much easier for all concerned, and I am sure I left the impression with you that I had concluded that I was determined in fact to have this unfortunate affair with the company adjusted in an amicable rather than a contentious spirit.

Since writing the above I have received a copy of your letter to Mr. Ward No. 46F, which was addressed to him by you in keeping with our conversation.

Would you permit me to make clear a passage in that letter which is somewhat ambiguous, I refer to the part wherein you say that "Mr. Steele is not altogether satisfied [132] with life in Japan and that he is not sorry that his stay here is not to be postponed."

This may be construed by Mr. Ward to mean that I am not in favor of serving the Company in Japan. With your kind permission I would like to state briefly that I have already told you, in this connection, that I had reference to my *business life* in Japan, as a member of the Tokio organization of the Company under existing conditions. Those conditions, as you are aware, tend to make the accountant of the Tokio office virtually, if not verbally, subordinate in matters of accounting to the heads of the other departments, import, engineering and building, a situation which in my opinion no self-respecting experienced American Accountant could endure for any great length of time.

However, this is not the time for details—suffice it to say, and I sincerely trust that you will take what I say in good part, that in matters relating to accounts and collections (not to mention anything else) our office needs to be thoroughly reconstructed, i. e. reorganized along modern lines, to meet the needs and requirements of the post-war competition that other large organizations like ours in Japan are preparing for.

Of course, Japan is not America—we all realize that, and local conditions will have to be met, but the science of accounting, as practiced in the United

States today, is based on “common-sense” and an expert accountant trained in the United States school of practical accounting, no matter where he goes or what business he is engaged to serve, may safely be trusted to find a practical solution to every problem that arises in his line—if *he can be given the requisite authority and encouragement to operate in his particular field of work.*

I trust my special report when it is completed, will [133] prove of sufficient merit to receive your endorsement, and I need hardly add in this connection that the approval of a gentleman of your wide business grasp and experience would be highly valued by me.

Very respectfully yours,

(Sgd.) A. TILTON STEELE.

ATS-CP [134]

Defendant's Exhibit No. 4.

Arbitration of case A. Tilton Steel; vs. D. H. Blake, Vice President, American Trading Co., Tokyo, Japan.

Mr. A. Tilton Steele has a contract with the American Trading Co., (Pacific Coast) a company which Mr. D. H. Blake states is an associated but with a separate and distinct organization from his American Trading Co., in Tokyo. The American Trading Co., (Pacific Coast) signed by Lewis A. Ward, Vice-president and Manager makes a three year contract from July 1st, 1918, with Mr. Steel as chief accountant at their Shanghai office including transportation thereto. On his way to Shanghai

Mr. Steele was stopped at Yokohama by wireless from Mr. Blake and requested to assume temporarily the duties of a Mr. Boyd of the Tokyo office while the latter was away on holiday. In the meantime it is developed that Mr. Steele's services were not needed at Shanghai and Mr. Blake states in writing that he began to negotiate with Mr. Steele for a cancellation of his contract and recommends to Mr. Steele that the matter should be referred to Mr. Lewis A. Ward, vice president and manager of the American Trading Co., (Pacific Coast) who had made the contract hereinbefore mentioned. Mr. Blake also writes that he never had any intention to disregard Mr. Steele's rights under this contract. In Mr. Blake's letter dated March 19th, 1919, he writes in part as follows: "We have received word from Mr. Burns, agent of Shanghai office that as he has made satisfactory arrangements with Mr. Manley (the chief accountant whose position under the contract Mr. Steele was to take) to remain with the Company, he Mr. Burns did not now wish Mr. Steele to come to Shanghai. We also confirm our statement that as soon as Mr. Boyd returns to his position in Tokyo, probably about the end of April we have no further use for your services [135] here, we cannot say that your recourse will be under your contract, but as intimated the other day the writer will be glad to render you such assistance as he can in order to effect a mutual satisfactory settlement—but before anything can be done in this connection it will be necessary for you to make some suggestions in the premises."

Mr. Blake's next letter is May 6th, in which he demands the return of a number of keys which he claims belongs to the company and notifies Mr. Steele that he has a debit balance of Y541.21 which he asks payment of at once to Mr. Blake. Mr. Blake's letter to Mr. Steele dated August 27th, 1918, employs him temporarily in Tokyo for practically the same salary as his contract, said temporary employment to be for such time as Mr. Boyd is absent on holiday which Mr. Blake estimates will be about six months. Mr. Blake further adds in this letter this time will of course apply to Mr. Steel's three year term as mentioned in original contract. Mr. Blake concludes this letter as follows: "It is understood between us that this temporary arrangement does not prejudice any verbal understanding which you (Mr. Steele) may have had with Mr. Ward or with Mr. Burns prior to your departure from San Francisco.

Mr. Steele also claims that he had a verbal understanding in San Francisco with Mr. Burns of the Shanghai office, that his passage back to San Francisco including all legitimate travelling expenses were to be paid by the Company and that both Mr. Ward and Mr. Burns stated to him (Mr. Steele) that this was the custom of the company in all cases of covenanted servants and that Mr. Steele would of course be treated in the same way.

After reading over carefully the briefs which have been submitted by both Mr. Blake and Mr. Steele I am of the opinion [136] that the matter of the three year contract should be referred to Mr.

Ward in San Francisco for settlement.

Second: That Mr. Blake should pay Mr. Steele in full until such time as Mr. Steele can secure first class passage back to San Francisco less any indebtedness that may be proved that Mr. Steele owes Mr. Blake.

Hoping that this conclusion may be mutually satisfactory, I am, gentlemen,

Yours very sincerely,

(Signed)

P. S. Mr. Steele's passage to San Francisco to be paid by Mr. Blake's Corp.

To Mr. D. H. Blake,

Vice-president American Trading Co.,

Tokyo, Japan. [137]

Defendant's Exhibit No. 5.

April 24, 1919.

Mr. A. L. Ward,

Vice-pres. & Gen. Mgr.,

American Trading Co., (Pacific Coast),

San Francisco.

My dear Mr. Ward: I am just informed that Mr. Boyd will be here on Monday next, and I shall have to hand over charge of the accountant department to him on the first of May.

I expect the auditor's report in any day now, and judging from what Mr. Bell has told me I believe that his firm will not certify to the correctness of the account except in a modified form unless and until a thorough investigation of the accounts of the building department has enabled him to verify cer-

tain stock balance carried forward to 1919.

Such an investigation would entail a great deal of time, labor and expense, and I have my doubts as to whether Mr. Blake would deem it advisable to incur this expense, particularly at this time, when he is busy organizing a new company to take care of the Truscon Building material interests as a separate concern.

I fully realize the inexpediency of going into the accounts of our building department at this time, as any trouble which may arise out of the investigation would perhaps prejudice the interests of the company in this new enterprise.

Be that as it may, I am sure that were the actual facts in their entirety relating to the accounts of the building department known to the head office they would agree with me that an investigation was very necessary. As Mr. Blake remarked to me when I called his attention [138] to the fact that the Kahn materials stock had never been verified and that account sales were made up and passed into our books upon the O. K. of Mr. Moss, that Mr. Moss practically fixed a profit on each job and thereby his commission as well, the accountant having no authority to question or to supervise his figures, that "Such a situation would be positively alarming" were it not for the utmost confidence he had in Mr. Moss' integrity and knowledge of the business.

I have not completed my special report to Mr. Blake on the subject of the existing conditions in the accounting department, and I feel from the way he has treated my suggestions in regards to collec-

tions that it would be labor lost were I to continue my efforts in that direction, and I am the more led to this conclusion after a conversation which I had recently with Mauger. This being so, I shall probably go to Shanghai and shall await your advice there instead of here, unless of course after Mr. Boyd's arrival here I see a disposition on the part of Mr. Blake to carry out my suggestions to the end of utilizing my services in the Tokio office for at least the period covered by my contract with the Company.

That the Tokio accounting department needs to be reorganized upon a modern basis is admitted by Mauger, who says in this connection that he and Boyd have been talking about it ever since he came from the Philippines in 1917, but from the time I have been here both Mr. Blake's and his attitude have been to defer any action to the end of improving conditions in the accounting department until Mr. Boyd got back, and now that Mr. Boyd will soon be here I expect that Mr. Blake will tell me that these improvements can be affected by Mauger and Boyd, without having another [139] high-priced accountant to elaborate with them. Upon this point I shall have something to say, and it is possible that what I will say will not be entirely acceptable to Mr. Blake or to Messrs. Mauger and Boyd—but I want to assure you that whatever I might say or do in this connection will be prompted by only one thought, actuated by only one motive, that is to better serve and safeguard the interests of the company than they have been in the past.

Each department had here appears to have a separate organization as if those departments were distinct entities or concerns subsidiary to the parent organization in New York but operating independently, as it were, of each other, the accountant department of the company being used merely to record their transactions to receive and disburse moneys, borrow funds to carry on the business, to retire their drafts, to investigate their financial standing of their customers and to hold in their behalf the securities deposited by those customers, without, however, any right, title or authority to look into the affairs of their respective departments. This arrangement often causes confusion between the accountant department and the other departments.

For example, the other day a check for about nine thousand yen came in by registered mail, was handed over by me in the usual course to our credit man, who went with it to the department where it belonged to get the requisite paper memos for purposes of record and receipting, and the check was duly deposited on that day. Two weeks later the head of that department comes in to me and says that in response to his request a settlement from the same company he had been informed that payment had already been made and he did not know anything about it.

This sort of thing happens very frequently due to the fact that there is not proper co-ordination of functions [140] between the sales managers, departments and the accountant, and too much dupli-

cation of records, too much unnecessary clerical work done by all departments concerned, when the accountant's department, if properly organized could handle everything to the entire satisfaction of all departments concerned.

I am merely touching upon the general condition existing. To go into details with you would be a voluminous task and furthermore would necessitate your being here to see things in operation, and if you were here you or any keen up-to-date American business man familiar with American methods would be forced to come to the same conclusions as I have.

Hoping to hear from you in answer to my letters of last month before I leave here, which will be by the first boat I can get passage on to Shanghai, I remain,

Very sincerely yours,

ATS-CP

I hereby certify that the foregoing letter is an exact copy as dictated by Mr. Steele and as taken from my stenographic notes.

Witness:

[141]

Defendant's Exhibit No. 6.

April 17, 1919

Mr. A. L. Ward,

Vice President and General Manager,

American Trading Co., (Pacific Coast)

San Francisco.

My dear Mr. Ward:

Since addressing you last there have been no new developments to advise you of.

The conference with Messrs. Bell & Taylor took place some days ago, and they are apparently still considering matters, for their report and statements are not forthcoming as yet. As soon as they come to hand and Mr. Blake is made aware of the actual condition existing, I shall make my special report to him and await his decision.

Perhaps the enclosed clipping may be of some interest to you and I might mention that I am doing considerable writing for various newspapers and magazines, both in California and here in Japan, and I have spoken to Mr. Blake on the subject and he thinks that there would be no objection to my doing this, provided I did not sign my name to those writings—and I have agreed with him that it would not be advisable in view of the ideas I have expressed, and shall express while I am in the Orient, may prove very unpalatable to the oriental man.

As regards Mr. Boyd's return, nobody here knows just when he is coming back, but I suppose before he leaves San Francisco, he will see you and you will know exactly when he is leaving.

Awaiting your advice with much interest, I remain,
Yours very sincerely,

ATS—SP. [142]

I hereby certify that the above is an exact copy of the letter dictated to me by Mr. Steele, as taken from my stenographic notes.

Witness:

_____ [143]

Defendant's Exhibit No. 7.

March 19, 1919.

A. Tilton Steele, Esq.,
American Trading Co.,
Tokio.

Dear Sir: With reference to our conversation of a few days ago, we beg to confirm what we told you at that time, to the effect that we had received word from Mr. Burns, agent of our Shanghai office, that as he had made satisfactory arrangements with Mr. Manley to remain with the Company, he did not now want you to come to Shanghai.

We also confirm our statement that as soon as Mr. Boyd returns to his position in Tokio, probably about the end of April, we shall have no further use for your service here.

We cannot say what your recourse will be under your contract, but, as intimated the other day, the writer will be glad to render you such assistance as he can in order to effect a mutually satisfactory settlement,—but before anything can be done in

this connection it will be necessary for you to make some suggestions in the premises.

We remain,

Yours very truly,

DHB/CP. [144]

Defendant's Exhibit No. 8.

May 6, 1919.

A. T. Steele, Esq.,

5, Enokizaka-machi, Akasaka,
Tokio.

Dear Sir:—I shall be obliged if you will kindly furnish me with certified copies of all letters which you have addressed to Mr. Ward, during the time you have been connected with this office, which in any way refer to the business of the office.

Your prompt compliance with this request will no doubt hasten the arbitration of our differences, and as that would no doubt be in keeping with your own ideas I hope you will not delay complying with my request.

I would also be glad to have you state to me in writing whether or not you sent to Mr. Ward a copy of our last auditor's report.

I have again to remind you that you have failed to turn over a number of keys which are urgently required by us. I understand that the desk in our office for which you hold the key contains only your private belongings, but I would call to your attention that this fact does not offer any excuse for your retaining possession of our property. Kindly let us have all of our keys at once.

I enclose herewith an account current showing that you have a debit balance of Yen 541.21, on our books, which we request that you pay in at once. I remain,

Yours very truly,
DHB/McD. [145]

Defendant's Exhibit No. 9.

March 19, 1919.

A. Tilton Steele, Esq.,
American Trading Co.,
Tokio, Japan.

Dear Sir:—With reference to our conversation of a few days ago, we beg to confirm what we told you at that time, to the effect that we had received word from Mr. Burns, agent of our Shanghai office, that as he had made satisfactory arrangements with Mr. Manley to remain with the company he did not now want you to come to Shanghai.

We also confirm our statement that as soon as Mr. Boyd returns to his position in Tokio, probably about the end of April, we shall have no further use for your services here.

We cannot say what your recourse will be under your contract, but, as intimated the other day, the writer will be glad to render you such assistance as he can in order to effect a mutually satisfactory settlement,—but before anything can be done in this connection it will be necessary for you to make some suggestions in the premises.

We remain,

Yours very truly,
DHB/CP. [146]

Defendant's Exhibit No. 10.

March 19, 1919.

Letter No. 46-F.

L. A. Ward, Esq.,

Vice-president American Trading Co., (Pacific
Coast.) @

San Francisco, Cal.

Dear Mr. Ward: I enclose herewith copy of letter which I have today addressed to Mr. Steele.

You will perhaps not be prepared for the news that Mr. Steele is not going to Shanghai to our office at that port. I presume that when Mr. Burns went through San Francisco this matter was not discussed with you, because Mr. Burns thought at that time that Mr. Steele would replace Mr. Manley after the return of Mr. Boyd to Tokio from his short holiday. In the meantime Mr. Burns has made satisfactory arrangements with Mr. Manley and desires to continue his services with the Company,—and that being the case, he has no position for Mr. Steele.

I had explained the whole situation to Mr. Steele and I think he fully understands the reason for the action which has been taken. I am pleased to say that he has accepted the situation very gracefully indeed and is quite willing to come to a friendly understanding with the American Trading Company.

I have suggested that in view of the fact that his contract was made with your good self, he return to San Francisco in due course and come to a settle-

ment with you, and he has been very agreeable to this suggestion.

I think I am correct in saying that Mr. Steele is not altogether satisfied with life in the Far East, and that he is not sorry that his stay here is not to be prolonged [147] even to the extent of the contract which he entered into. He is, however, desirous of obtaining some kind of a Government appointment in India, and he tells me that you were fully acquainted with his wishes in this respect at the time you entered into negotiations with him on behalf of the American Trading Company. He would like us to render him such assistance as we can to enable him to get such an appointment, and I have told him that we would provide him with such letters of recommendation as we could, but beyond that I cannot see that we can be of any material assistance. However, I hope that you will do anything that you are able to do in his behalf.

I cannot say at this writing just when Mr. Steele will return to San Francisco, but I am expecting that Mr. Boyd will be back here not later than the end of April, and in that case probably Mr. Steele could get away from here sometime during May.

I am giving Mr. Steele a copy of this letter.

I remain,

Very truly yours,

DHB/CP.

Enclosure.

P. S. Since writing the above, Mr. Steele has called my attention to the fact that my remarks

with reference to his not being satisfied with life in the Far East are not exactly in accordance with facts. His proposition is that he is not pleased with life in Japan, but that as far as China is concerned he believes that he would have been entirely satisfied to have completed his contract in that Country. D. H. B. [148]

In the United States Court for China.

A. TILTON STEELE,

Plaintiff,

vs.

AMERICAN TRADING COMPANY,

Defendant.

(Cause No. 798; filed April 20, 1920.)

Decision.

Syllabus.

1.—Contracts: Employment. A contract of employment as “Chief Accountant of our Shanghai office” for three years at a minimum compensation of \$10,000, conditioned upon the employe “doing his work in an efficient and satisfactory way” cannot be terminated by the employer on a ground independent of the “way” in which the accountant did his work.

2.—. —. The measure of damages in an action by the employe for the wrongful termination of such a contract (as distinguished from an action for salary) is the amount he would have received thereunder, viz., \$10,000., less any payments and outside earnings.

3.—.—Onus Probandi. The employer has the burden of proving what other employment the employe might obtain.

4.—.—Exchange. Where such contract is silent as to the rate of exchange, the evidence must show that the minds of the parties met *aliunde* on a specific rate before it can be applied.

5.—Pleading: Immaterial averments are not admitted by a failure to deny and an averment must be clear and unequivocal to support a judgment on the pleadings.

6.—Arbitration and Award: Where the matter submitted is the amount due under two contracts and the arbitrator merely refers one of them to a third party, and leaves proof to be taken elsewhere as regards the other, there is no valid award.

Jernigan, Fessenden & Rose, by Mr. Fessenden, and Rodger & Haskell by Mr. Haskell, for plaintiff.

Fleming, Davies & Bryan, by Mr. Bryan, for defendant.

LOBINGIER, J.:

Plaintiff sues for the breach of a contract of employment evidenced in part by the following instrument (Ex. "A."):

"San Francisco, Cal., May 27, 1918.

Mr. A. Tilton Steele,

Present.

Dear Sir: Confirming the writer's conversations with you during the past few days, we have employed you as follows: —

Position.—Chief Accountant of our Shanghai office, the duties of which office you are to take up

as quickly as possible, proceeding herefrom for Shanghai within about thirty days.

Duration of Employment.—Three years from July 1 next or earlier if the time of your departure from San Francisco for Shanghai hereunder be earlier. Should you not leave San Francisco for Shanghai hereunder prior to July 1, your salary will commence on July 1. [149]

Compensation.—Two Hundred and Fifty (\$250.00) Dollars U. S. Gold per month for the first year and for the second and third year adjustments of salary to be made at the end of the first and second year, as may be mutually agreed; your compensation, however, not to be less than Ten Thousand (\$10,000.00) Dollars for the entire period of three years.

Satisfactory Service.—The undertakings herein contained on our part are all conditioned upon your doing your work in an efficient and satisfactory way.

Transportation to Shanghai.—In addition to salary, as herein provided, we will provide you with first-class transportation to Shanghai.

Bond.—It is a condition of your employment that you give any bond the Company may require, the Company paying the premium thereon.

Yours truly,

AMERICAN TRADING COMPANY.

(Pacific Coast)

LOUIS A. WARD,

Vice President & Manager.

Confirmed and Accepted:—

A. TILTON STEELE.

In its answer defendant alleged that this instrument was executed not by it, but by a distinct corporation, viz., the American Trading Company (Pacific Coast). But at the trial defendant's executive head in Shanghai testified (pp. 16, 28) that plaintiff's employment was authorized by defendant's President. On August 6 following the execution of said instrument, and pursuant to its terms, plaintiff sailed from Seattle for Shanghai but while en route received a radiogram from defendant's Vice President at Yokohama reading:

"This (there?) is probability your being required Tokyo office for few months before going Shanghai. Please be prepared to leave ship in Yokohama. Blake.

AMERICAN TRADING."

Following an interview at Yokohama defendant's Vice-president wrote plaintiff the following letter, after receiving which, he testifies (pp. 4, 5) he worked at defendant's Tokyo Office until May 3, 1919:

"Tokyo, Aug. 27th, 1918.

A. Tilton Steele, Esq.,

Present,

Dear Sir: We beg to confirm our conversation of yesterday's date with reference to your temporary employment in this Office.

Compensation: The Compensation provided for in your original contract made with Mr. L. A. Ward, Vice-president and Manager of the American Trading Company of the Pacific Coast on May 27th calls for a salary of \$250.00 Gold per month,

or a salary of not less than \$10,000.00 for the three years' period of your contract. We have arranged that you are to receive \$250.00 Gold at exchange 50, which is the equivalent of Yen 500.00 per month together with an additional allowance of Yen 150.00 per month to cover any additional expenses which you may be put to owing to the change in your plans. The two items above mentioned will make a total of Yen 650.00 per month which you will receive while you are in the employ of our Tokyo Office. [150]

Term of Employment: As explained to you, we wish you to remain in Tokyo during the time that Mr. Boyd is absent on holiday which we estimate will be about six months. This time will, of course, apply on your three years' term as mentioned in your original contract.

Travelling Expenses: Any legitimate traveling expenses incurred by you on behalf of the company will be refunded to you.

General: It is understood between us that this temporary arrangement does not prejudice any verbal understanding which you may have had with Mr. Ward or with Mr. Burns prior to your departure from San Francisco.

We remain, Dear Sir,

Very truly yours,

AMERICAN TRADING COMPANY.

D. H. BLAKE,

Vice-president.

Nearly seven months later, the same party wrote again as follows:

“Tokyo, March 19, 1919.

A. Tilton Steele, Esq.,
American Trading Co.,
Tokyo.

Dear Sir:

With reference to our conversation of a few days ago, we beg to confirm what we told you at that time, to the effect that we have received word from Mr. Burns, Agent of our Shanghai Office, that as he had made satisfactory arrangements with Mr. Manley to remain with the Company, he did not now want you to come to Shanghai.

We also confirm our statement that as soon as Mr. Boyd returns to his position in Tokyo, probably about the end of April, we shall have no further use for your services here.

We cannot say what your recourse will be under your contract, but, as intimated the other day, the writer will be glad to render you such assistance as he can in order to effect a mutually satisfactory settlement,—but before anything can be done in this connection it will be necessary for you to make some suggestions in the premises.

We remain,

Yours very truly,

AMERICAN TRADING COMPANY.

D. H. BLAKE,

Vice-president.

Plaintiff testifies (pp. 11–13) that he later went to Shanghai and offered by telephone to carry out his contract with defendant but was told not to come and this is confirmed (p. 28) by defendant's

agent in Shanghai. Plaintiff's employment, as we have seen (Ex. "A") was as "Chief Accountant of our Shanghai office" and was "conditioned upon your (his) doing your work in an efficient and satisfactory way." Is it possible to decide that he was unable so to do the work of that particular position when he was given no opportunity to do it?

Plaintiff's counsel contends that

* * * It is established beyond a shadow of a doubt by the evidence, the conduct of defendant, and defendant's pleadings that the defendant not only regarded the letter of August 27, 1918 and the original contract as separate and distinct agreements but acted accordingly even to the extent of denying being a party to the original agreement," and [151] "that evidence of unsatisfactory services under one contract, performed in one country and under certain conditions, is neither competent nor relevant to prove that services to be performed in another country under different conditions, even though for the same company, would be unsatisfactory."

But even if it be conceded, as defendant's counsel urges, that "the letter of August 27 was merely a supplemental agreement to the original contract," can we import into the former all the terms of the latter? For the former was not "conditioned upon" plaintiff's "doing his work in an efficient and satisfactory way," and it contained no clause authorizing defendant to discharge plaintiff within the term of his "temporary employment" which

was "during the time that Mr. Boyd is absent." (Ex. "C.") Again, and more important still, can we import into the original contract of employment as "Chief Accountant of our Shanghai office" the condition of "doing his work in an efficient and satisfactory way" as chief accountant in the Tokyo office under a separate, even if supplemental, agreement, so as to justify exclusion from the former for unsatisfactory service in the latter? Such an attempt seems to approach dangerously near the forbidden process of making a new contract for the parties.

But, even were we to do so, we could not enlarge the condition of the original contract that plaintiff should do "his work in an efficient and satisfactory way." Counsel contends that "the Court has merely to inquire * * * whether or not the defendant was dissatisfied" and that we "cannot decide whether defendant should have been satisfied." But under a clause like this, which authorizes discharge, not if defendant was "dissatisfied" with plaintiff, but only if the latter failed to do "his work in an efficient and satisfactory way,"¹

1. "Where the chief thing the parties have had in mind was to effect some definite purpose or end, of the performance of which others could judge just as well as the parties could, and which involved no considerations strictly personal, the stipulation that it should be done to the satisfaction of the party has been generally held not to be controlling." *Frery vs. Rubber Co.*, 23 Minn. 264, 53 N. W. 1156.

we must, as we read the authorities,² “inquire” and “decide” whether the dismissal was really because of the “way” plaintiff did his “work” or on some other ground.

We find very little in the evidence as to the “way” in which plaintiff did his “work” as Chief Accountant even in Tokyo. Most of the criticisms of him relate to other matters than his actual work as Chief Accountant. The Shanghai agent of the defendant testified (p. 18) that he objected to plaintiff “on account of his personality.” But his “personality” was not a ground for dismissal, even under the original contract, unless it rendered his work as Chief Accountant inefficient and unsatisfactory. And the only reason given plaintiff for his dismissal was that as same agent “had made satisfactory arrangements with Mr. Manley to remain with the Company, he did not now want you to come to Shanghai.” (Ex. D.) Moreover the incident stressed by Mr. Paget occurred after the dismissal (p. 63) and could

2. Louisiana. Hotchkiss vs. Gretna Co., 36 La. Ann. 517.

Maine. Winship vs. Portland, etc. Assn., 78 Me. 571, 7 Atl. 706.

Mississippi. Atlanta Stove Works vs. Hamilton, 83 Miss. 704, 35 So. 763.

Michigan. Jones vs. Transp. Co., 51 Mich. 539, 16 N. W. 893.

New York. Doll vs. Noble, 116 N. Y. 230, 22 N. E. 406, and citations.

Texas. Rhodes Co. vs. Frazier, 55 N. W. 192.

Vermont. Daggett vs. Johnson, 49 Vt. 345.

not have furnished the cause thereof. Certainly the conduct of the parties at the time of the transaction, and not afterward, is the best index to the real ground.

Counsel invokes a written statement (Ex. 2) prepared by defendant's Vice-President for the arbitration proceedings hereafter mentioned. This document is dated May 10, 1919, after plaintiff had been discharged, and it is objected to as not properly in evidence. But we have decided to receive, for what they are worth, all exhibits offered by either party and we shall notice this as the Vice-president's last and most carefully prepared statement of his objections to plaintiff and one which he would hardly have improved upon had he testified in Court.

The criticisms of plaintiff in the statement may be summarized as follows: (1) Desire to change the system of accounting; (2) tardiness in attendance and "disregard of our office rules" (particulars not given); (3) writing letters about the office to the Vice-president of the American Trading Co. (Pacific Coast).

As to the first, plaintiff claims in his testimony (pp. 45 et seq.) that the system of accounting needed improvement. There is no evidence that he was mistaken. On the contrary his proposals appear not to have been unwelcome even up to the time he left the Tokyo Office. On April 12 and again on April 30 he wrote regarding the matter to the Vice-president, the second letter reading in part as follows:
[153]

“Re Improvement in the System of Account & Collection. May I know definitely if the suggestions embodied in my letter to you dated April 12-19 are approved by you, and whether or not it is your desire that I should remain in the Tokyo Office to Co-operate with Messrs. Mauger & Boyd in the proposed changes?”

To this the Vice-president replied on the same date:

“With reference to your letter of the 12th inst., I am keenly interested in your suggestion, but it is quite impossible for me to say at this time whether or not we shall put your suggested scheme into operation.”

Surely there is no suggestion in this that plaintiff's proposals for improvement affected unfavorably the character of his work.

As to the second complaint plaintiff denies (p. 41) the charge that he disregarded office rules and testifies (p. 32):

“On one or two occasions Mr. Blake saw me in the hall leading to my office and he had already come in, I think it was about a quarter of an hour or twenty minutes to nine, and he said ‘well you are late’ and I said ‘yes, but it was on the Company's business.

Q. Now as a matter of fact during the period you served there did you serve the full extent of the office period?

A. More than that. I didn't go to tiffin during the lunch hour of twelve to two. I was the only person in the office during the lunch period.”

Plaintiff's duties as accountant were not like those of a salesman or other employe who must meet the public at certain hours. There is no claim that the time devoted to his work as an accountant was insufficient.

As to the third complaint plaintiff states (pp. 44 et seq.) that he wrote the Vice-president at San Francisco believing him to be the superior of all and that it was to the interest of the defendant company that he should receive the information thus transmitted. In this plaintiff may have been mistaken but we cannot see that what he did was any part of his "work" as chief accountant.

Plaintiff also testifies (pp. 31 et seq.) that these complaints were not made to him by the Vice-president at Tokyo, that "the point of dissatisfaction was never mentioned" by the latter and that the real ground of plaintiff's dismissal was quite different. This is corroborated by the said Vice-president's letter of March 19, 1919, quoted above (p. 3) and by another which he wrote on the same day to the San Francisco Vice-president, reading in part as follows:

"You will perhaps not be prepared for the news that Mr. Steele is not going to Shanghai to our office at that port. [154] I presume that when Mr. Burns went through San Francisco this matter was not discussed with you, because Mr. Burns thought at that time that Mr. Steele would replace Mr. Manley after the return of Mr. Boyd to Tokyo from his short holiday. In the meantime Mr. Burns has made satisfactory arrangements with Mr. Manley and desires to

continue his services with the Company,—and that being the case he has no position for Mr. Steele.” (Ex. 10).

Not a word in this about unsatisfactory or inefficient service. He was writing to another company official, and could speak without reserve, yet the only cause assigned for plaintiff’s dismissal was that the Shanghai office had persuaded another to remain in his place.

Finally in his letter of May 2, 1919 the same Vice-president informs plaintiff

“that in giving up your duties and handing over charge of the Accountant Department to Mr. Boyd, as requested by me, both verbally and in writing, your rights and interests under your original agreement with the Company, or my letter of August 27th, 1918, will not be prejudiced in any way.” (Ex. “G”)

Such was defendant’s position at the time of the dismissal and before the statement of May 10 was prepared. In view of it and the lack of countervailing evidence we are unable to find that such dismissal took place because plaintiff failed to do his work as Chief Accountant in the Tokyo Office “in an efficient and satisfactory way”; or that defendant sought to terminate on that ground his employment under the original contract; or that it was justified in so terminating said contract. It follows that we must find that said contract was wrongfully terminated.

II.

But it is claimed that the question of the character

of plaintiff's work is determined against him on the pleadings by virtue of the failure to deny in his replication the averment of the answer

“That the alleged services rendered by the plaintiff herein to the defendant were neither satisfactory nor efficient, as required in the contract alleged in plaintiff's petition, a copy of which is attached thereto and marked exhibit “A,” and that the said plaintiff in the performance of his alleged duties was inefficient, negligent and insubordinate to his superiors.”

But what were the “alleged services” and “alleged duties” here mentioned? How were they alleged and by whom? The complaint alleges nothing about plaintiff's “duties” or “services.” Neither did the contract (Ex. “A”) require the “services rendered by the plaintiff”—i. e. in Tokio—to be “satisfactory or efficient.” The averment is, therefore, indefinite whereas, to support a judgment, it “must be distinct and unequivocal.”³

Again the only services in issue here are the actual (not alleged) ones which plaintiff rendered in Tokio and the future (tho not alleged) ones which he offered, but was not permitted, to render in Shanghai. None of these can correctly be included in the phrase “alleged services” and the averment regarding them is thus also immaterial. But immaterial allegations are not admitted by failure to deny,⁴ and the only ones which are so admitted are those which are well

3. 23 Cyc. 731 (note 12). [155]

4. 31 Cyc. 209 (note 87).

pleaded.⁵ For when a party bases his claim on a technical rule of pleading, or a technical oversight on the part of his adversary, his own pleadings must bear microscopic scrutiny and nothing therein will be implied or supplied by intendment.

Plaintiff's counsel may have considered that defendant's averment regarding "alleged services" was too vague and uncertain to require a denial. Or they may have relied on the practice heretofore followed in this Court that in the absence of a reply new matter in the answer will be taken as denied.⁶ This is because the old Court Regulations⁷ provide for but one pleading for each party and the Court has not yet found time to frame a different rule. If by this situation plaintiff were misled into his failure to deny, it would be the Court's duty, even now, to permit him to amend by adding such denial;⁸ for the case was tried on the theory that he did not admit that his services were inefficient or unsatisfactory. But we consider such amendment unnecessary, because we could not base a judgment on the averment regarding "alleged services," and the motion for such judgment is overruled.

5. *Id.* (note 81); *Alston vs. Wilson*, 44 Ia. 130, 132; *Moulton vs. Doran*, 10 Minn. 67 (49).

6. Compare the group of code states enumerated in 31 Cyc. 242 (56).

7. Sec. 5.

8. Act of Congress of June 6, 1900, 31 U. S. Stats. at Large Secs. 1, Ch. 786, secs. 92, 97; *Alaska Compiled Laws*, secs. 924, 929; in force here under the doctrine of *Biddle vs. U. S.*, 156 Fed. 759. [156]

III.

It is also claimed that plaintiff is barred in this action by an award. On May 2, 1919 he wrote defendant's Vice-president:

“It must also be distinctly understood between us, in writing, in accordance with the terms of my understanding with our Ambassador, the Hon'ble Mr. Roland Morris, reached in my conversation with him at the Embassy yesterday, that we are both to agree and to state such agreement in writing to him, assenting to the arbitration of the Hon'ble Mr. Potter, whose award must be considered as binding to both parties in the matter of the main issue involved in the case, viz., the amount of compensation to be paid to me here at the Tokyo office of the company in full settlement of all my claims against the company under the two agreements I have with the company.”

And on the same date the Vice-president replied:

“With reference to the arbitration of our differences, I confirm my previously expressed willingness to acquiesce in the suggestion made by H. E. Ambassador Morris, that the arbitration should be placed in the hands of the Honorable Mr. Potter, who is at present in Tokyo, and that his award should be binding on both parties, and shall be settled in Tokyo.”

Likewise on the same day the parties notified the Ambassador that

“In accordance with your kind suggestion, we, the undersigned agree to the arbitration of our

differences by the Honorable Mr. Potter, and undertake to abide by and put into effect whatever award he makes.”

But the statement of what “our differences” are, and hence the real terms of submission, are found only in the letters exchanged between the parties and the issue there submitted is clearly enough stated in the words italicised above. But the arbitrator, after briefs had been submitted on both sides, expressed

“the opinion that the matter of the three year contract should be referred to Mr. Ward in San Francisco for settlement; second, that Mr. Blake should pay Mr. Steele in full until such time as Mr. Steele can secure first class passage back to San Francisco less any indebtedness that may be proved that Mr. Steele owes Mr. Blake.”

Plaintiff’s counsel deny that this constitutes a valid award because it (1) fails to dispose of the issue submitted and (2) attempts to delegate authority. We see no escape from these objections. The arbitrator did not determine “the amount of compensation to be paid” plaintiff “in full settlement” of all his claims “under the two agreements” nor was the matter “settled in Tokyo.” On the contrary he expressed the opinion that the whole “matter of the three year contract (the principal of “the two agreements”) should be referred to another, “for settlement” elsewhere. He, indeed, expressed the opinion that plaintiff should be paid (presumably under the second contract as the first was to be “referred” to another) “in full” until he could

secure return passage, which should have been a matter of a few days; but such payment was to be "less any indebtedness that may be proved." [157]

How and where was it to be proved? Evidently not before the arbitrator. As to the second, contract then plaintiff was left with the possible alternative—which he ultimately adopted—of resorting to the courts; while as to the first contract he was "referred to Mr. Ward in San Francisco for settlement." Both of these expedients were open to plaintiff before submission and the action of the arbitrator, consequently, left him just where he was before. To say that it disposed of the issue submitted, therefore, is to trifle with language. And if it failed to dispose of that issue it was not a bar to this proceeding. For under the law in force here, which, in the absence of contrary proof, is presumed⁹ to be the same as that of Japan where the arbitration was held,

The award must be such a disposition of the matter submitted that nothing further remains to fix the rights and obligations of the parties, that the party against whom it is made can perform or pay it without any further ascertainment of rights or duties, and that further litigation shall not be necessary in order to adjust the matters submitted.¹⁰

Defendant's counsel contends that the phrase last above quoted from the report of the arbitrator was not a delegation of authority because he

9. See the writer's "Foreign Laws," *Am. & Eng. Encyc. of Law* (2nd ed.) XIII, 1061.

10. *Corpus Juris*, V., 139.

“undoubtedly meant that Steel had no case against the American Trading Co. of Maine and that he should proceed to San Francisco and try to settle the matter with Mr. Ward.”

If that is what he meant he chose an unfortunate mode of expressing it. For the arbitrator's report contains no intimation that he considered plaintiff “had no case against” defendant. If so why was “the matter of the three year contract” (which was with defendant alone) to be “referred * * * for settlement”? Since a “settlement” of that matter was considered necessary there must have been something to settle—i. e. a “case.”

It is conceded that the arbitrator could not delegate his authority to Mr. Ward or any one else.¹¹ But if he did not attempt to do so it was only because his language amounted to nothing more than an expression of opinion or suggestion in which case it was not an award at all.¹² If he did not expressly say “I refer the matter to Mr. Ward” he likewise did not say “I award plaintiff this” and “I reject or dismiss his claim as to that.”

We find no defect in the replication as regards the alleged award. Its averment that the same “is void and of no effect and not binding on plaintiff” seems not only sufficient as a pleading but in accordance with the facts and the law.

IV.

Under his original agreement plaintiff's compen-

11. *Id.* 142.

12. *Lock vs. Vulliamy* 5 B. & Ad. 600, 27 E. C. L. 255 (110 Reprint, 912.) [158]

sation was “not to be less than \$10,000, for the entire period of three years.” In his brief (p. 27) he

“admits having received the equivalent of Gold \$2500 on account of the contract which leaves a balance of G. \$7500 which the plaintiff could have earned if he had not been wrongfully discharged.”

The rule established for this jurisdiction in actions for breach of contract is that

“the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken.”¹³

And where, as here, the “cause of action was not for wages but for damages for breach of the contract,”¹⁴ prospective damages—even those to accrue after the trial¹⁵—may be included.

13 Benjamin vs. Hillard, 23 How. (U. S.) 149, 16 Law ed. 518 (quoting Alder vs. Keighly, 15 M. & W., 117; Hadley vs. Baxendale, 9 Exch. 341;) Pierce vs. R. Co., 173 U. S., 143 Law ed. 591. “The amount of the agreed wages may be taken as the measure of damages *prima facie*.” Saxonía etc. Co. vs. Cook, 7 Colo. 569, 4 Pac. 1111, quoted with approval in Alaska etc. Co. vs. Chase, 128 Fed. 889.

14. Alaska etc. Co. vs. Chase, 128 Fed. 886, 889.

15. American China Development Co. vs. Boyd, 148 Fed. 268, 368 (on appeal from the Consular Court for the District of Shanghai and very similar to the case at bar) citing Hochster vs. De la Tour, 2 El. & Bl. 678; Rhodes vs. R. Co., 49 W. Va. 500, 39 S. E. 209. The first case fixes the law for this jurisdiction regardless of the earlier cases of Schroeder vs. Trading Co., 95 Fed. 296 and Darst vs. Alkali Works, 81 Fed. 284, cited by defendant and which limit recovery to date of trial.

Defendant's counsel cites decisions ¹⁶ of certain state Courts to the contention that,

“plaintiff must not only allege but must prove a willingness to perform and also that he has been unable to get other employment.”

But the Court of Appeals, in the principal case¹⁷ already cited, where there was no averment of inability “to get other employment,” has adopted a different rule, quoting a well known commentator who states it as follows:

“The burden of proof is on the defendant to show that the plaintiff might have obtained other employment; for the failure of the plaintiff to obtain other employment does not affect the right of action, but only goes in reduction of damages, and if nothing else is shown, the plaintiff is entitled to recover the contract price upon proving the defendant's violation of the contract, and his own willingness to perform.”¹⁸

We are unable to find that defendant in the case at bar has assumed this burden. Its agent at

16. Kentucky. *Shepherd vs. Gambill*, 96 S. W., 1104; *Lewis Co. vs. Scott*, 95 Ky. 484, 26 S. W. 192. Mississippi. *Hunt vs. Crane*, 33 Miss. 669, holding that where plaintiff “obtains employment, the presumption is, that he gets the best wages he can; because the strong inducement of self-interest would impel him to do so, and the idea is most unreasonable, that he did not act accordingly.” Texas. *Gulf etc. R. Co. vs. Jackson*, 69 S. W. 89.

17 *American China Development Co. vs. Boyd*, 148 Fed. 258. [159]

18. *Sedgwick, Damages*, (8th ed.) 11, sec. 667.

Shanghai states (p. 25) that "it should be easy" for a man of plaintiff's qualifications and experience to obtain a position here. But plaintiff testified (pp. 66 et seq.) that he had advertised in the newspapers and "had applied to over 60 firms here personally." He stated that he could probably obtain a subordinate position as bookkeeper but intimates (p. 68) that to accept it would cause him to lose standing as an accountant which any one familiar with conditions in Shanghai can well understand. We cannot think that a party, whose contract has been broken, is obliged, in order to reduce his adversary's damages, to accept employment which would affect injuriously his own future career. And while, as we have seen, it was not incumbent on plaintiff to prove that he had sufficiently sought other employment we think he has done so even more satisfactorily than did the corresponding party who held the burden of proof in one of the cases which defendant cites and where the court said:

"While the evidence as to appellee's efforts to secure other employment, and as to what portion of the time covered by the contract he was unable to secure other employment, is meager and somewhat unsatisfactory, we cannot say that, in the absence of any contradictory evidence on the part of appellant, it was too indefinite and uncertain to support a finding for any wages due under the contract."¹⁹

The complaint alleges

19. Gulf etc. R. Co. vs. Jackson, 69 S W. 89, 91.
[160]

“That the Defendant Corporation agreed to to pay the Plaintiff the aforesaid Ten Thousand Gold Dollars (\$10,000) at an exchange rate of Fifty-five Gold Cents to the Tael, and Seventy Two Tael Cents to the Dollar Mexican (\$1.00.)”

But in their brief (p. 26) counsel frankly admit that “regarding the question of exchange there is more or less uncertainty” and that in the original contract “nothing was said about exchange.” The chief support of the averment above quoted is that part of plaintiff’s testimony where he relates an interview in San Francisco, after his original agreement was executed, with the Shanghai agent of defendant, as follows:

“I asked Mr. Burns specifically to settle with me at what rate of exchange in taels or Mexican dollars I should be paid my salary, before I left San Francisco.

Q. And what did Mr. Burns reply to that?

A. He said it was the—first I said that I understood that the usual rate of exchange was two Mexican dollars to one gold, and I would not accept anything less than that. Then Mr. Burns said our office does even better than that, our special rate is 55 cents gold to the tael and all our American employees get their salaries on that basis.

Q. Was any memorandum made at that time of that conversation?

A. Then I asked Mr. Burns what that would amount to in Mexican dollars and he turned to a portfolio he carried and brought out a payroll

sheet of the Company's Shanghai office and referred to it, and I happened to have some paper in my hands and he didn't have any loose handy and I handed it to him to figure it out how much it would amount to at the rate of 72 tael cents for one Mexican dollar.

Q. Was there any memorandum made in writing at that time?

A. He figured out what my salary of \$250.00 gold dollars would amount to and it amounted to 632 Mexican dollars.

Q. Answer my question, please.

A. Yes, there was.

Q. Have you got that memorandum?

A. It is among those papers.

Q. You find it please. I hand you Plaintiff's Exhibit "E" and ask if that is the memorandum made at that time.

A. Yes, Mr. Burns own figures. He figured it out and said the amount was—he figured it out that my salary would amount to 632 Mexican dollars."

On the other hand in the agent's version (pp. 17-19) of the same interview he speaks of telling plaintiff

"that the men in our office were carried upon a more or less uniform rate and that when he got to Shanghai he would be treated in a proper way by Mr. Roper, who was acting agent. As I was not in charge of the Shanghai office then, he would have to leave these matters to be adjusted

with Mr. Roper, who, I was quite certain, would make all satisfactory arrangements with him.

Q. Did you hear Mr. Steele state when he was in the witness box that you promised him that he should have a rate of 55 tael cents to the gold dollar?

A. I told him he would be paid upon the same basis as the other men in the office who are under the same arrangements. That I was quite sure that Mr. Roper would treat him exactly the same as I would if I were there.

Q. You never promised him such a rate as he testified you did?

A. No. Otherwise I would have written Shanghai at the time what I had promised."

* * * "Q. Did you ever promise him or agree with him to pay any specified rate of exchange on his contract?

A. I discussed the exchange with him and he said he would prefer a rate of 50 cents Mex. to the Mex. dollar and I told him that would be foolish, to wait until he got out to Shanghai and he would say at once that our rate of exchange, which was about 39, was better. He was asking for 50. [161]

Q. In other words no arrangement was made.

A. No final and definite arrangement was made in San Francisco. It was to be left to Shanghai as it always is unless * * *

* * * "Q. I understood you to say that you did assure Mr. Steele that he would be

treated on the same basis as the other employees?

A. I told him I was sure that Mr. Roper would treat him in all kindness.

Q. You have a fixed rate of exchange for all your employees?

A. Not for all. It is specified in our contracts.

Q. All the same rate?

A. All on a basis of 55 gold cents to the Shanghai dollar, current rate Mexican dollar.

Q. Do all your employees receive that rate?

A. Not all.

We do not find it necessary to resolve the question of veracity between these two witnesses as to the authorship of the memorandum of figures (Ex. "E") mentioned by plaintiff. Regardless of who wrote them the figures throw very little light on the crucial question whether the Shanghai agent did actually assume, in behalf of the defendant company, (even supposing he had such authority), to make the alleged rate of exchange a part of plaintiff's contract and to pledge defendant's liability therefor. We doubt if plaintiff's own testimony, standing alone, shows that he did, or discloses anything more than information given by the agent as to what the salary would be if the alleged rate were agreed upon. To prove a contract for that rate it must appear that the minds of both parties actually met thereon²⁰ and in the light of the whole testimony that seems more than doubtful.

20. Shanghai Tannery Co., Ltd., vs. American Trading Co., U. S. Court for China, No. 466. [162]

It must be remembered in this connection not only that another agent was then in charge at Shanghai but that the one with whom the interview was held opposed (pp. 18, 20) plaintiff's employment. Indeed the latter's counsel in their brief (p. 13) stress this fact as the real ground for plaintiff's dismissal. Is it reasonable to suppose, then, that said agent would voluntarily undertake to supply a feature of plaintiff's contract which he knew had been omitted by his company and which would amount to more than doubling plaintiff's salary?

But the interview did apprise plaintiff of the importance of adding such a clause and he was then still in San Francisco where the contract was made and where it could have been modified had such been the purpose of both parties. Nay, more, when plaintiff reached Japan the second agreement, which he there accepted, specifically fixed the rate of exchange altho if plaintiff's theory of an existing verbal contract were correct that would have been unnecessary except so far as to apply the agreed rate to Japanese currency. We repeat as to plaintiff what we have already said in effect of defendant that Courts cannot make contracts for parties.

The Court finds that plaintiff is entitled to recover as damages for breach of his contract, as found above, the unpaid balance of his guaranteed compensation, to wit the sum of seventy-five hundred dollars (\$7,500) U. S. currency, less the item of fifty dollars (\$50.) Mexican currency, which plaintiff admits (p. 74) having earned meanwhile.

It is accordingly considered and adjudged that plaintiff have and recover from defendant the said sum, less the said item, together with his costs. [163]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE,

Plaintiff,

vs.

AMERICAN TRADING CO.,

Defendant.

Notice of Appeal.

Please take notice that the defendant herein hereby gives notice of appeal from the decision and judgment of the Court filed in the above-entitled matter on April 20, 1920.

FLEMING, DAVIES & BRYAN,

By R. T. BRYAN, Jr.,

Attorneys for the Defendant.

Shanghai, China,

April 21, 1920.

To Messrs. Jernigan, Fessenden & Rose, and Messrs.
Rodger & Haskell.

Filed at Shanghai, China, April 21, 1920. James
P. Connolly, Clerk. [164]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE,

Plaintiff,

vs.

AMERICAN TRADING CO.,

Defendant.

Motion for Extension of Time to Perfect Appeal.

Now comes the defendant through its attorneys, Messrs. Fleming, Davies & Bryan, and moves this Honorable Court for an extension of fourteen days in which to perfect its appeal.

(Sgd.) FLEMING, DAVIES & BRYAN,

Attorneys for Defendant.

Filed at Shanghai, China, May 22, 1920. James P. Connolly, Clerk. [165]

In the United States Court for China.

Cause No.—.

Civil No.—.

A. T. STEELE,

Plaintiff,

vs.

AMERICAN TRADING CO.,

Defendant.

**Order Extending Time to October 15, 1920, to File
Record and Docket Cause.**

For satisfactory reasons appearing to the Court, the time for filing the record in this cause in the Circuit Court of Appeals of the Ninth Judicial Circuit, pursuant to the writ of error sued out, is extended until the 15th day of October, 1920.

CHARLES S. LOBINGIER,

Judge of the United States Court for China.

Filed at Shanghai, China, 1920.———Clerk.
[166]

In the United States Circuit Court for China.
Cause No. 798.

Civil 272.

A. T. STEELE,

Plaintiff,

vs.

AMERICAN TRADING CO.,

Defendant.

Bill of Exceptions.

Be it remembered that on January 14, 1920, the above-entitled cause came on for hearing before the Honorable Chas. S. Lobingier, Judge of the United States Court for China. The plaintiff appearing by Messrs. Jernigan, Fessenden & Rose and Rodger & Haskell, his counsel, and the defendant appearing by Messrs. Fleming, Davies & Bryan, its counsel, and the following proceedings took place: Defendant offered in support of its motion, filed the

day previous, for a continuance in order to take the deposition of one D. H. Blake, an affidavit by one W. A. Burns, filed with said motion. After argument, the following order was, by agreement of counsel for both parties, announced in open court and later on the same day entered of record:

“This cause comes on for hearing on defendant’s motion to take deposition on commission:

On consideration whereof, plaintiff’s counsel having agreed in open Court to waive objections to the letters written by the proposed witness and to the testimony of the affiant in support of said motion as to conversations with said witness regarding the subject matter of said proposed testimony, said waiver being restricted to such objections as relate only to the secondary character of said evidence;

The said motion is accordingly overruled and by consent of both parties this cause is set for trial on Friday, January 23, at 9:30 A. M.”

On the day last above written the cause again came on for hearing, counsel for both parties being present, whereupon the [167] trial began and the following witnesses were called and examined, after being duly sworn:

Testimony of Mr. A. T. Steele, for Plaintiff.

(Questions by Mr. HASKELL.)

Direct Examination.

Q. What is your name?

A. Arthur Tilton Steele.

Q. Your nationality? A. American.

(Testimony of A. T. Steele.)

Q. Your age? A. 47.

Q. What is your business, Mr. Steele?

A. At the present time?

Q. Well, what is your business profession?

A. Accountant.

Q. Have you any business at the present time?

A. No, sir.

Q. I will hand you this document and ask you to tell the Court what it is.

Plaintiff's Exhibit "A" offered and received in evidence. Handing witness Exhibit "A."

A. This was an agreement in writing that was executed between Mr. Louis A. Ward, Vice-president and Manager of The American Trading Company, San Francisco, and myself.

Q. Now, then, this document is signed by Louis A. Ward, American Trading Company, Pacific Coast, is it not?

A. Yes, sir; and I accepted it.

Q. Now, do you know whether or not the American Trading Company, Pacific Coast, was authorized by the American Trading Company, the defendant company, to enter into this contract?

A. Yes. [168—2]

Q. How do you know that?

Objection by Mr. Bryan.

Objection overruled. Exception noted.

A. A few days before the signing of the agreement, Mr. Ward showed me a telegram which was signed by Sutcliff, to the effect that—

Mr. BRYAN.—I object.

(Testimony of A. T. Steele.)

Ruling reserved; if the evidence proves to be improper it will not be considered.

First Exception.

Exception as to manner of ruling and to admission of the evidence.

Q. You say you saw a telegram, where did you see [169—3] that telegram?

A. It was in the private office of Mr. Louis A. Ward, Vice-president of the American Trading Company.

Q. At what place? A. San Francisco.

Q. Do you know where that telegram is at the present time?

A. I think it is in the office of Mr. Ward.

Q. Are you familiar with the customs and practice of the American Trading Company?

A. Am I what?

Q. Familiar with the customs and practice of filing?

A. It is probably in the custody of Miss Versalovitch, private secretary to Mr. Louis A. Ward.

Q. Can you tell the Court the contents of that telegram?

Objection by Mr. Bryan.

A. Engage Steele as chief accountant Shanghai office subject to ten thousand dollars gold bond and his credentials being found entirely satisfactory. Sutcliffs.

Q. Now, do you know what Sutcliff was?

A. Sutcliff, Mr. Ward informed me—

Mr. BRYAN.—I object to any conversations had

(Testimony of A. T. Steele.)

by the plaintiff with Mr. Ward.

The COURT.—Objection overruled.

Second Exception.

To which ruling of the Court the defendant then and there excepted.

A. I know who Mr. Sutcliff is now?

Q. Who is he?

A. He is the Vice-president of the American Trading Company of New York, and executive head of the far eastern division of that company. [170—4]

Q. Referring to that Company, do you mean the defendant company?

A. The American Trading Company, New York.

Q. Now, after you entered into the contract, when did you start in the performance of the terms of that contract?

A. When did I start?

Q. Yes, under the terms of the contract, when did you leave San Francisco— Well, I might ask that over, when did you leave San Francisco?

A. On the 6th of August, 1918.

Q. And you proceeded to what place?

A. To Shanghai.

Q. To Shanghai? A. Yes.

Q. Did you proceed direct to Shanghai?

A. To Seattle first, and from Seattle to Shanghai.

Q. Did you get to Shanghai? A. No.

Q. Why?

A. About the 19th of August, 1918, I received a wireless on board the “Kashima Maru” while I was on the way, signed by Blake, to the effect that

(Testimony of A. T. Steele.)

there was a probability of my being needed in the Tokyo office and requesting me to stop over at Yokohama and see him at the Tokyo office of the Company. This is the wireless I received on board the "Kashima Maru."

Q. (Handing witness Plaintiff's Exhibit "B.") This is the telegram you received?

A. This is the wireless I received.

Plaintiff's Exhibit "B" received in evidence.

Q. Did you stop off in Japan? [171—5]

A. I did.

Q. And what did you do then?

A. I went to the Yokohama office and Mr. Bear, the branch manager let me have a boy to guide me to the Tokyo office of the company.

Q. And were you employed at that office?

A. I was.

Q. Did you have any memorandum regarding your employment there? A. Yes, an agreement.

Q. Is this the agreement? (Handing witness Plaintiff's Exhibit "C.")

A. Yes, sir; this is the letter—the agreement that was executed between Mr. D. H. Blake, Vice-president and General Manager of the Far East for the American Trading Company, and myself.

Plaintiff's Exhibit "C" offered in evidence.

Mr. BRYAN.—I object on the ground that this exhibit is irrelevant and immaterial to the case.

The COURT.—Objection overruled.

Third Exception.

To which ruling of the Court the defendant then and there excepted.

(Testimony of A. T. Steele.)

Q. Now, in accordance with that agreement, did you go to work for the American Trading Company in Tokyo? A. Yes, sir.

Q. And how long did you work there?

A. From the date of that agreement, August 27, 1918, to the time I handed over charge to the man who was replaced, Mr. Boyd, on May 3d, 1919, when I completed handing over charge to Mr. Boyd, whose position I occupied during that time. [172—6]

Q. Now, why were your services terminated at that time?

A. You mean my services in the Tokyo office?

Q. Your services with the defendant company.

A. They were terminated by my handing over charge to Mr. Boyd, whose position I was occupying *pro tem*.

Q. Yes, but why did you hand over the position to Mr. Boyd?

A. Because that was according to the terms of the agreement I had with Mr. Blake. z

Q. Did you then proceed to Shanghai as under your original agreement? A. No.

Q. Why not?

A. Because Mr. Blake advised me by letter on the 19th of March, I think, that Mr. Burns, the Shanghai agent, had made arrangements with Mr. Manley to remain in the employ of the company and he did not want me to come to Shanghai. Mr. Burns did not want me to come to Shanghai.

Q. Were you ready and willing, and did you want to come to Shanghai and take up that employment?

A. Yes, sir.

(Testimony of A. T. Steele.)

Mr. BRYAN.—I object.

The COURT.—Objection overruled.

Fourth Exception.

To which ruling of the Court the defendant then and there excepted.

Q. I hand you Plaintiff's Exhibit "D," and ask if [173—7] that is the letter you referred to in answer to my last question.

A. Yes, sir. That is the letter that gave me the intimation that Mr. Burns had made arrangements to retain Mr. Manley and he didn't want me to proceed to Shanghai. Yes, sir, that is the letter.

Q. Now, after receiving that letter, what did you do?

A. I discussed the matter of my agreement with Mr. Blake.

Q. And was there anything done in regard to that?

A. He wrote a letter to Mr. Ward about it.

Q. Now, coming back to San Francisco again. Before the time you left San Francisco for the Orient, did you meet Mr. Burns of the defendant company? A. Yes, sir.

Q. Where did you meet him?

A. In the office of the American Trading Company, San Francisco.

Q. Did you have any conversation with him?

A. Yes.

Q. About what date was that?

A. I cannot recall the exact date. It was about the last week in July, 1918.

(Testimony of A. T. Steele.)

Q. Who was present at that time?

A. Mr. Ward was present at the first interview.

Q. And what was the substance of the conversation?

A. Mr. Burns said he had talked with Mr. Ward about my employment at the Shanghai office of the company as chief accountant and it was all right, he was glad an American accountant was going to replace Mr. Manley, a Britisher.

Q. Was that all? [174—8]

A. That's all, I think.

Q. Did you have any other conversation with Mr. Burns about that time?

A. Yes, I think it was that afternoon.

Q. At what place?

A. At the same,—in the room adjoining Mr. Ward's private office.

Q. And who was present at that time?

A. Nobody was present except Mr. Burns and myself.

Q. What was the substance of that conversation?

A. We discussed my duties as chief accountant Shanghai office and I told Mr. Burns that nobody in the office knew at exactly what rate of exchange I would get my salary, and I wanted that settled before I left.

Mr. BRYAN.—I object.

The COURT.—Objection overruled.

Fifth Exception.

To which ruling of the Court the defendant then and there excepted.

(Testimony of A. T. Steele.)

Q. Was there anything more said at that time?

A. Yes, I asked Mr. Burns specifically to settle with me at what rate of exchange in taels or Mexican dollars I should be paid my salary, before I left San Francisco.

Q. And what did Mr. Burns reply to that?

A. He said it was the—first I said that I understood that the usual rate of exchange was two Mexican dollars to one gold, and I would not accept anything less than that. Then Mr. Burns said our office does even better than that; our special rate is 55 cents gold to the tael and all our American employees get their salaries on that basis.

Q. Was any memorandum made at that time of that conversation? [175—9]

A. Then I asked Mr. Burns what that would amount to in Mexican dollars, and he turned to a portfolio he carried and brought out a payroll sheet of the Company's Shanghai office and referred to it, and I happened to have some paper in my hands and he didn't have any loose sheets handy and I handed it to him to figure it out how much it would amount to at the rate of 72 taels cents for one Mexican dollar.

Q. Was there any memorandum made in writing at that time?

A. He figured out what my salary of \$250.00 gold dollars would amount to and it amounted to 632 Mexican dollars.

Q. Answer my question, please.

A. Yes, there was.

(Testimony of A. T. Steele.)

Q. Have you got that memorandum?

A. It is among those papers.

Q. You find it, please. I hand you Plaintiff's Exhibit "E" and ask if that is the memorandum made at that time.

A. Yes, Mr. Burns' own figures. He figured it out and said the amount was—he figured it out that my salary would amount to 632 Mexican dollars.

Q. And whose writing is that?

A. Mr. Burns'. Mr. Burns figured it out himself in pencil.

Q. Did you see him?

A. Yes, it was right there at that interview.

Exhibit "E" offered in evidence.

Q. In accordance with the terms of your contract with the defendant company you were to receive a salary of not less than 250 gold dollars a month. For how many months during the term of this agreement did you receive that salary?

A. I received that salary for nine months in Tokyo, at the [176—10] rate of 500 yen per month. Two yen to one gold dollar.

Q. And—

A. I was given an extra allowance of \$150.00 a month as a compensation for the difference in exchange between 632 Mexican dollars, and I pointed out to Mr. Blake that my salary would be 632 Mexican dollars and he said he could not pay me more than 650 because Mr. Boyd, chief accountant [177—11] of the Tokyo office was getting that and that was the most he could pay me, and I accepted it.

(Testimony of A. T. Steele.)

Q. Then your statement is that the defendant company paid you only nine months' salary in accordance with the terms of this agreement.

A. And I had received \$250 in San Francisco for travelling expenses.

Q. Was that to be applied to your salary?

A. I finally agreed with Mr. Blake, about the 24th of December that that was to apply to my salary for the month of July.

Q. Then you were paid for ten months?

A. Ten months.

Q. Have you demanded payment for the balance of the term of your contract? A. Yes.

Q. Have you received anything on that account?

A. Not a cent.

Q. Are you employed at the present time?

A. I am not exactly employed, but I am trying to get employment as a public accountant here.

Q. You say you are not exactly employed—just what do you mean?

A. I mean I am not in any regular employment.

Q. Are you making any money?

A. So far I have not earned anything, but I have prospects.

Q. That is all.

Cross-examination.

(Questions by Mr. BRYAN.)

Q. Now, Mr. Steele, how long were you in Japan?

A. I was in Japan from August 27, 1918, down to [178—12] August 7, 1919.

Q. How long were you in Japan after you were

(Testimony of A. T. Steele.)

discharged, as you say, by a letter on March 17th?

A. From March 17,—from March 19—do you mean from the date of that letter?

Q. Yes. A. March 19 to August 7.

Q. Now, when did you leave the employment of the American Trading Company?

A. I handed over charge on the 3d day of May, 1919, to Mr. Boyd.

Q. Now, from the 3d of May to August 7th, what were you doing?

A. I was waiting for advice from San Francisco in compliance with Mr. Ward's instructions.

Q. Did you endeavor to obtain any other employment? A. I certainly did.

Q. Who did you endeavor to obtain it from?

Q. From a number of people there.

Q. Who?

A. The Mitsui Company, Mitsui Busan Kaisha, in some capacity suitable for a foreigner.

Q. Why didn't anything come out of this application? Did anything come out of this application?

A. No.

Q. Did they offer you anything? A. No.

Q. Not a thing?

A. No, I could not get any employment in Tokyo, that is why I came here.

Q. Did you go anywhere else?

A. I called at a number of places.

Q. Well, what other places did you call besides the [179—13] Mitsui Busan Kaisha?

A. I called at the Standard Oil Company, in fact

(Testimony of A. T. Steele.)

I made a written application to the Standard Oil Company which I think I have among my papers.

Q. Did you call on anyone else?

A. I called on the Horne Company.

Q. Alright, anyone else?

A. F. W. Horne, I think it was, yes, and—

Q. You have had a good deal of experience at accounting haven't you? A. Yes.

Q. You took the Cambridge examination in India between 1886 and 1890, didn't you? A. Yes.

Q. You were Junior Assistant in Calcutta for about a year? A. Yes.

Q. Then you were in the marine insurance business? A. Yes.

Q. You were the manager for a purchasing agency for hides and skins in Bengal from 1893 to 1902?

A. I was doing my own business, yes, as manager. I was doing my own business.

Q. Then you were in the business of public accounting from 1904 to 1908?

A. In Los Angeles, yes.

Q. Then you were the manager of a public accounting company for awhile, weren't you?

A. From 1909 to 1918.

Q. So you have had a vast amount of experience in accounting and other business matters?

A. Yes.

Q. And yet you were in Tokyo from May 3d to August [180—14] 7, and unable to obtain employment.

(Testimony of A. T. Steele.)

A. Yes, for the reason that Mr. Blake didn't help me at all. On the contrary used his influence against me.

Q. Now how long have you been in Shanghai?

A. I have been in Shanghai since about the 14th of August.

Q. What have you been doing all that time?

A. Oh, I have been writing for the papers and went around to see if I could get anything to do.

Q. Have you made application for a position in any case in Shanghai?

A. I have applied personally, yes.

Q. And yet you have been unable to get any other employment?

A. Yes, I presume Mr. Burns has already helped in that direction, because I had to refer to the American Trading Company.

Q. Now did you ever go to the American Trading Company after you came to Shanghai and offer to work for them?

A. I telephoned over to Mr. Burns and he told me not to come.

Q. Did you offer to carry out your contract?

A. I certainly did.

Q. When did you telephone?

A. About the second or third day after I arrived here.

Q. You are absolutely sure about that?

A. I am absolutely sure and Mr. Burns answered the telephone.

Q. What was the date that you telephoned him?

(Testimony of A. T. Steele.)

A. It must have been about the 18th of August, I guess. [181—15]

Q. How long was that after you arrived in Shanghai?

A. Oh, three or four days.

Q. You didn't telephone then when you first arrived? A. No, because I had my suit here.

Q. Oh, you filed suit then before you informed him, is that it? A. Why surely.

Q. You never offered then to enter into the employment of the American Trading Company of Shanghai until after you filed suit?

A. No, sir, I wrote Mr. Burns two letters. I have copies of those two letters.

Q. What are the dates of those two letters?

A. I think—I don't recall. I think it was February. Some date in February. May I refer to those copies?

Q. That is while you were at the Tokyo office?

A. Yes.

Q. Well, you never offered to work at the Shanghai office after you arrived in Shanghai until after you instituted suit? A. Yes I did.

Q. When? A. In Tokyo.

Q. You never made an offer in Shanghai?

A. No.

Q. You never offered to go to the office and work?

A. I already filed suit, on July 2d. I arrived here August 2.

Q. The first thing you did in Shanghai was to file suit.

(Testimony of A. T. Steele.)

A. The suit had been filed by Mr. Haskell while I was in Tokyo. [182—16]

Q. You never offered in any sense or in any manner to carry out this contract with the Shanghai office?

A. I did. I wrote two letters to Mr. Burns.

Q. You never went to the office here and offered to start work?

A. Because Mr. Burns told me not to come. I telephoned to him.

Q. After the suit was started. A. Yes.

Q. Now when did you have this conversation with Mr. Burns about the exchange?

A. About the last week in July, 1918.

Q. Who was present?

A. At the second interview? Nobody but Mr. Burns and I.

Q. At the first? A. Mr. Ward.

Q. Where was this interview held?

A. In the private office of Mr. Ward.

Q. Where was the second one held?

A. In the room adjoining Mr. Ward's. I think it was sort of a consultation room.

Q. Now where was this second interview held?

A. In the room adjoining Mr. Ward's private office.

Q. Are you absolutely sure that those are Mr. Burn's own figures? (Referring to Plaintiff's Exhibit "E.")

A. He figured it out, yes.

Q. Suppose Mr. Burns says these are not his fig-

(Testimony of A. T. Steele.)

ures and he never wrote it?

A. I could only say that he was prevaricating.

Q. Are you absolutely sure about it? [183—17]

A. I am absolutely sure about it.

Q. Now I put it to you that what Mr. Burns told you was that the business, the arrangement of exchange would be made after you arrived at Shanghai? A. Yes, sir.

Q. I put it to you that no arrangement was made at that time? A. No, sir.

Q. And I put it to you he never made any arrangement about exchange with you?

A. It is in our—

Q. You deny that any such thing was settled?

A. Absolutely I would not have left San Francisco had it not been settled.

Testimony of Mr. Burns, for Defendant.

Direct Examination.

(Questions by Mr. FESSENDEN.)

Q. Your full name?

A. William Andrew Burns.

Q. Nationality? A. American.

Q. Age? A. 48.

Q. Present occupation?

A. Agent, the American Trading Company, Shanghai.

Q. Are you the Executive head of the American Trading Company Shanghai? A. I am.

Q. How long have you occupied that position?

A. Four years, barring six months leave at home.

(Testimony of Mr. Burns.)

Q. Now in your capacity as agent of the American Trading Company here you have done more or less [184—18] business with the American Trading Company of the Pacific Coast? A. Yes.

Q. Although that Company is under a different charter than the American Trading Company here, these two companies are closely allied are they not?

A. Yes.

Q. And is it not a fact that San Francisco, or the American Trading Company of the Pacific Coast, are your general business agents there? You do all your business in San Francisco through them?

A. Not entirely, no, we trade with others on the Pacific Coast.

Q. No, but they are your general representatives there of your head office?

A. No, no more than we are here for them. They trade with other firms here and we trade largely with other firms on the Pacific Coast.

Q. It is correct, is it not, that the American Trading Company Pacific Coast has no office under that name here? A. Yes.

Q. Nor any here else in the Far East?

A. Not that I know of.

Q. Now you were in San Francisco the latter part of July, 1918? A. Yes.

And while you were there you had certain discussions with Mr. Steele about his coming to work in your office here? I don't want to know at this moment what they were, but if you [185—19] had a discussion with him.

(Testimony of Mr. Burns.)

A. Mr. Ward wanted me to meet him before he left for Seattle.

Q. And you did meet him? A. Yes.

Q. And you did discuss the duties—

A. Discussed that he should not come here as chief accountant.

Q. But he was coming to work in your office here?

A. Yes.

Q. Now was your position—you had some instructions, or some information that this man, Mr. Steele, was coming to work in your office at Sanghai?

A. Yes. The information came through Tokyo just as I was leaving for America.

Q. And am I correct to assume that it came from Mr. Blake? A. Mr. Blake.

Q. And I am also correct in that Mr. Blake was Vice-president and General Manager of the American Trading Company of the Far East?

A. Not now, he was then, yes.

Q. You have put in a sworn statement that that contract was not signed by any duly authorized agent of your company. Can you tell me who had authority to send Mr. Steele to work in the Shanghai office of the defendant company? By whose authority was he sent here?

A. I haven't gone into by whose authority he was sent here.

He was sent here against my wishes, entirely without any authorization from this office.

Q. Now Mr. Burns, you have been associated with [186—20] the American Trading Company for

(Testimony of Mr. Burns.)

some years in an executive capacity. Can't you tell me by whose authority Mr. Steele was started to Shanghai?

A. Well I assume from the telegram in evidence here that Mr. Sutcliff must have done it.

Q. And Mr. Sutcliff at that time was Vice-president of the defendant company? A. Yes.

Q. Now you proceeded to your head office, after that, to New York? A. Yes.

Q. Did you have—did you take up with any official of your company in New York the question of Mr. Steele coming to Shanghai?

A. Yes, with Mr. Moss. I raised the question of why men were employed to come out here at a time when I was to be away and would have no means of placing them properly in the staff.

Q. Am I correct to assume that Mr. Moss was President of the defendant company? A. Yes.

Q. And I am correct to assume that Mr. Steele was sent here with the knowledge and consent of the President of the defendant company?

A. It would appear so.

Q. Do you know as a matter of fact whether Mr. Ward had instructions from New York to employ Mr. Steele? A. This telegram—

Q. I don't care anything about the telegram—when you were in New York yourself? You are an executive. [187—21]

A. Yes, when I was in New York Mr. Moss told me not being able to get a man in New York, he consulted with Mr. Ward.

(Testimony of Mr. Burns.)

Q. Were the transportation expenses of Mr. Steele from San Francisco to Shanghai charged up by the San Francisco office to the Shanghai office?

A. They were and were carried on our books, and a cash advance made to Mr. Steele was transferred to Tokyo and the travelling expenses were carried out on our books.

Cross-examination.

(Questions by Mr. Bryan.)

Q. Now, Mr. Burns, you stated that you had some conversation with Mr. Steele, while in San Francisco, will you please state the substance of that conversation?

A. Yes, I met Mr. Steele at the instance of Mr. Ward. He wanted me to meet him before he left for Seattle and then Mr. Ward wanted me to discuss matters with him and we met in the afternoon in the consulting room and discussed generally that his going out while I was home on leave would mean a re-adjustment of the conditions, that he could not go as chief accountant but must go as assistant if he was to come into the office. He then asked me about the basis of exchange and I told him that the men in our office were carried upon a more or less uniform rate and that when he got to Shanghai he would be treated in a proper way by Mr. Roper, who was acting agent. As I was not in charge of the Shanghai office then, he would have to leave these matters to be adjusted with Mr. Roper, whom, I was quite certain, would

(Testimony of Mr. Burns.)

make [188—22] all satisfactory arrangements with him.

Q. Did you hear Mr. Steele state when he was in the witness-box that you promised him that he should have a rate of 55 tael cents to the gold dollar?

A. I told him he would be paid upon the same basis as the other men in the office who are under the same arrangements. That I was quite sure that Mr. Roper would treat him exactly the same as I would if I were there.

Q. You never promised him such a rate as he testified you did?

A. No. Otherwise I would have written Shanghai at the time what I had promised.

Q. Now, did you ever see plaintiff's Exhibit "E" before to-day? A. No.

Q. Are those your figures?

A. They are not.

Q. You don't know whose figures they are?

A. I do not.

Q. But they are not yours?

A. They are not mine.

Q. Did you ever give Mr. Steele any sort of a memorandum containing figures regarding exchange? A. No.

Q. Did you ever promise him or agree with him to pay him any specified rate of exchange on his contract?

A. I discussed the exchange with him and he said he would prefer a rate of 50 cents Mex. to the

(Testimony of Mr. Burns.)

Mex. dollar and I told him that would be foolish, [189—23] to wait until he got out to Shanghai and he would say at once that our rate of exchange, which was about 39, was better. He was asking for 50.

Q. In other words no arrangement was made?

A. No final and definite arrangement was made in San Francisco. It was to be left to Shanghai as it always is unless—

Q. Now, you stated that you objected to Mr. Steele's coming out here?

A. I objected, to Mr. Ward, after meeting him.

Q. For what reason?

A. On account of his personality.

Q. Why did you object to Mr. Steele's personality?

Q. Mr. Burns, you stated that there were certain items on the books that had been transferred to the Tokyo office. Why were those items transferred to the Tokyo office?

A. For instance when he was taken on as Mr. Boyd's successor,—the item of cash which was taken over—there was an item of cash given to him personally there and was charged to the Tokyo office and they collected from his salaries there.

Redirect Examination.

(Questions by Mr. FESSENDEN.)

Q. I understood you to say that you did assure [190—24] Mr. Steele that he would be treated on the same basis as the other employees?

(Testimony of Mr. Burns.)

A. I told him I was sure that Mr. Roper would treat him in all kindness.

Q. You have a fixed rate of exchange for all your employees?

A. Not for all. It is specified in our contracts.

Q. All the same rate?

A. All on a basis of 55 gold cents to the Shanghai dollar, current rate Mexican dollar.

Q. Do all your employees receive that rate?

A. Not all.

Motion.—Mr. BRYAN.—I move for judgment on the pleadings on the ground that the plaintiff has failed to deny allegation 10 of defendant's amended answer, thereby having admitted that the services of the plaintiff were unsatisfactory.

The COURT.—Ruling reserved. If the evidence proves to be improper it will not be considered.

Sixth Exception.

Exception as to manner of ruling i. e., ruling reserved and provisional exception in case of motion being overruled. Defendant's counsel by putting on evidence in defense does not waive any rights that he may have by failure of plaintiff to deny certain allegations of new matter made in defendant's answer. This is made without objection.

(Examined by Mr. BRYAN.)

Q. Now, Mr. Burns, when did you first meet Mr. Steele? A. In San Francisco.

Q. When was this?

A. In July, 1918. [191—25]

(Testimony of Mr. Burns.)

Q. Previous to that time had you informed, or requested anyone in connection with the American Trading Company to obtain an accountant for you? A. Yes.

Q. Whom had you requested?

A. Our New York office.

Q. Now, was there any understanding as to whether or not they should inform you or write you or cable you before employing any such man?

Mr. FESSENDEN.—I object on account of the evidence being irrelevant and immaterial.

The COURT.—Overruled.

A. Both the president and the treasurer of the Company had written me that before employing any man they would cable fully. At that time we were in need of a sub-agent and an accountant, or assistant accountant.

Q. Now, was this understanding carried out in this particular case? A. No.

Q. Were you informed before Mr. Steele was employed? A. No.

Q. Did you receive any cablegram or letter regarding his employment before he was employed?

A. No.

Q. When was the first time that you knew that he had been employed?

A. A telegram from Mr. Blake.

Q. Now, when you first saw Mr. Steele did you approve of him? A. No.

Q. Why didn't you approve of him?

A. I stated to Mr. Ward after my conversation

(Testimony of Mr. Burns.)

with [192—26] Mr. Steele that I thought a mistake had been made, as Mr. Ward told me that Mr. Steele was born of Indian and American parentage in India, and that whatever our feelings might be in the matter, that there was strong prejudice against Eurasians in China and that as chief accountant in our office he would find it very difficult to deal with these objections in China.

Q. You were merely considering the unfortunate position that people like him were placed in Shanghai? A. Yes.

Q. You had no prejudice against him personally?

A. None whatsoever at that time.

Q. It is a fact, isn't it, that in Shanghai people in a position like that Mr. Steele was to occupy, would have to consult with Managers of the Banks and with other Managers of other companies?

A. Yes, especially the managers of Banks.

Q. And where a man has to do a thing of that sort he has to be a man that has some social standing in that community?

Objection by Mr. Fessenden. Sustained.

Q. Did you have any conversation with Mr. Blake relative to the manner in which Mr. Steele rendered his services in Tokyo? A. Yes.

Q. State to the court in substance what those conversations were.

Mr. FESSENDEN.—I object on the ground that the evidence is hearsay.

The COURT.—Overruled. This evidence is ad-

(Testimony of Mr. Burns.)

missible under the order of January 14th, 1920.
[193—27]

Q. Will you state the substance of your conversation with Mr. Blake regarding the services rendered by Mr. Steele at the Tokyo office?

A. When I arrived at Yokohama on my way back to Shanghai after a furlough, Mr. Blake spoke to me about Mr. Steele and said his services had been most unsatisfactory. That he had been very dilatory, came to the office at 9-30, 10-00, etc., and when Mr. Blake spoke to him, told him, if he didn't mend his ways he had better go back to San Francisco. Said he was a great disturber in the office, that he objected to methods laid down by his superiors, that he had taken on writing for the newspapers and had written articles which, if traced back to an employee of the American Trading Company, might injure its business, and that, all in all, he would be a very unsatisfactory man for me to accept for Shanghai, and I told him that under these circumstances that I wished that he would make an arrangement with Mr. Steele to cancel any arrangements that might have been made to come to Shanghai, and that if there was any expense attached thereto that, while I didn't consider it my business, the Shanghai office would most willingly stand it rather than have Mr. Steele come on to the Shanghai office.

Q. And the reasons you have stated for not wanting Mr. Steele were brought about on account of what Mr. Blake told you? A. Yes.

Q. And did you receive any correspondence or any

(Testimony of Mr. Burns.)

[194—28] letters from Mr. Blake regarding the unsatisfactoriness or inefficiency rendered by Mr. Steele?

A. I did eventually receive a letter from Mr. Blake enclosing all correspondence with Mr. Steele and the arbitrator's award and the decision of the arbitrator regarding this matter.

(Defendant's Exhibit 1 received in evidence.)

(Handing witness Defendant's Exhibit 2.) Received in evidence.

Q. What is this letter?

A. An enclosure received from Mr. Blake in a letter which has been submitted to the court, being Mr. Blake's brief to Mr. Potter in the arbitration arranged between Mr. Steele and the American Trading Company of Tokyo.

Q. Did you write to Mr. Blake and ask him for the documents and papers in the Steele matter?

A. I did.

Q. And as a result of that letter you received a letter dated June 10th, 1919. A. Yes.

Q. And in that letter this was enclosed?

A. Yes. He stated in that letter that he was handing me all of these papers covering the entire case and waiting the decision of the arbitrator, which he sent with it.

(Handing witness Defendant's Exhibit No. 3.)

Q. What is this, Mr. Burns?

A. A letter from Mr. Steele to Mr. Blake, dated March 19, Tokyo.

(Handing witness Defendant's Exhibit No. 4.)

(Testimony of Mr. Burns.)

Q. What is that, Mr. Burns?

A. The decision of Mr. Potter, the arbitrator, in the case of Steele vs. Blake. [195—29.]

Q. Was that enclosed in the letter of June 10th?

A. Yes, it is specifically mentioned in that letter.

Q. Did you write to Mr. Blake asking for the papers in the Steele matter? A. Yes.

Q. And as a result of that letter you received a letter of June 10th, enclosing—including enclosures, one of which is this? A. Yes.

Q. (Handing witness Defendant's Exhibit No. 5.) What is this, Mr. Burns?

A. A letter written by Steele to Ward.

Q. Was that included in the letter of June 10th?

A. Yes.

Q. The letter of June 10th was an answer to a letter that you wrote requesting Mr. Blake to send you all the papers in the Steele matter?

A. Yes.

Q. And this was enclosed in that letter?

A. Yes.

(Handing witness Defendant's Exhibit No. 6.)

Q. What is this, Mr. Burns?

A. Another letter written by Steele to Ward, dated April 17.

Q. Was that enclosed in the letter of June 10th?

A. Yes.

Q. And the letter of June 10th was in answer to a request for all papers in the Steele matter?

A. Yes.

(Testimony of Mr. Burns.)

Q. And this was enclosed in the letter of June 10th? A. Yes.

(Handing witness Defendant's Exhibit No. 7.)

Q. What is this, Mr. Burns? [196—30]

A. A letter from Mr. Steele dated March 19th.

Q. (Handing witness Defendant's Exhibit No. 8.)
What is this, Mr. Burns?

A. Letter from Mr. Blake to Mr. Steele dated May 6th.

Q. Was this enclosed in the letter of June 10th?

A. It was.

Q. (Handing witness Defendant's Exhibit No. 9.) What is this, Mr. Burns?

A. Letter from Mr. Blake to Mr. Steele, dated March 19th.

Q. Was that enclosed in the letter of June 10th?

A. Yes.

Q. (Handing witness Defendant's Exhibit No. 10.) Now, what is this, Mr. Burns?

A. Letter of Mr. Blake addressed to Mr. Ward, San Francisco, dated March 19th.

Q. This was enclosed in the letter of June 10th?

A. Yes.

Defendant's exhibits 1 to 10, inclusive, offered in evidence.

Mr. FESSENDEN.—I object to the admission of Defendant's Exhibits Nos. 2, 5, 6, 8, 3 and 10 on the ground that they are inadmissible under the order of January 14, 1920.

The COURT.—Ruling reserved. If on inspec-

(Testimony of Mr. Burns.)

tion they appear to be inadmissible they will not be considered.

Seventh Exception.

Q. Mr. Burns, where are,—as far as you know, where are the original letters of which the one is enclosed in the letter of June 10th, are copies? [197—31]

A. In the case of the papers relating to the arbitration, they are in the hands of Mr. Potter, the arbitrator, who has left Tokyo and has gone to Philadelphia, and Mr. Blake, who has gone to London to take charge of our London office.

Q. Have you endeavored to get a certified copy of these?

A. Yes, we tried to get it from the Minister at Tokyo and he said it should be obtained from Mr. Potter and we have cabled to America to try to get copies of all the papers in the arbitration.

Q. You have used every effort to try to get the original papers or certified copies? A. Yes.

Q. And up to the present you have not been able to get them?

A. They have not come as yet. I telegraphed Mr. Blake at San Francisco, and at New York. The Tokyo office have. It is out of my jurisdiction completely.

Q. Mr. Blake is the only one who had any direct knowledge of this matter? The only one in authority?

A. The matter was entirely in his hands as general manager of the Company for the Far East.

(Testimony of Mr. Burns.)

Q. Has Mr. Steele ever come to the office in Shanghai and offered to enter into the employment of the— A. Never.

Q. Would you say, Mr. Burns, that in Shanghai it would be possible for a qualified accountant having had twenty-eight years' experience to get a position in Shanghai? [198—32]

Objection by Mr. Fessenden.

Objection sustained.

Q. Mr. Burns, how long have you been in Shanghai? A. Four years.

Q. Have you a good knowledge of business conditions in Shanghai? A. I think I have.

Q. How many men do you employ in the office of the American Trading Company here?

A. 35 Europeans and 110 Chinese.

Q. Do you know whether or not there is any demand for good men in Shanghai to work in connection with commercial houses?

A. Good men find very little difficulty in getting good positions in Shanghai at the present time.

Q. Would it be hard or easy for a qualified accountant having had twenty-eight years' experience to obtain a position in Shanghai, if he tried?

A. It should be easy.

Q. About what salary should a man having had twenty years' experience,—what salary should he demand?

Mr. FESSENDEN.—I object on the ground that this evidence is irrelevant and immaterial. (Withdrawn.)

(Testimony of Mr. Burns.)

Q. About what salary according to the usual salaries paid in Shanghai, would a qualified accountant get who had had twenty-eight years of experience,—what would he be entitled to in some commercial house in Shanghai?

A. Depends upon the nationality of the house. An American firm would pay a qualified accountant, with a good reputation, and good standing, with [199—33] that number of years' experience, from three hundred gold dollars per month to five thousand gold dollars per year.

Q. Now, Mr. Steele has intimated that you have attempted to prevent him from getting other employment in Shanghai, is that so?

A. No, we have never had a reference made to us since I have known that he has been in Shanghai.

Q. You don't know whether or not anyone ever contemplated employing him? A. No.

Q. Did you ever authorize anyone in writing, Mr. Burns, to make a contract for the employment of an accountant? A. No.

Q. Any conversation that you might have had with anyone regarding this matter was all done verbally and nothing in writing? A. Yes.

Q. Now, under what law is the American Trading Company in Shanghai incorporated?

A. State of Maine.

Q. And the American Trading Company Pacific Coast?

(Testimony of Mr. Burns.)

A. Mr. Fessenden states that it is under the State of Virginia.

Q. Up to the time of the filing of this action you believed it was incorporated under what State?

A. The State of California.

Q. It is entirely a different corporation from the American Trading Company of Shanghai?

A. Yes.

Q. Is the American Trading Company, Pacific Coast, your general agent in San Francisco or not?
[200—34] A. No.

Q. Do you forward goods to California to other persons than the American Trading Company, Pacific Coast? A. Yes.

Q. Does the American Trading Company of the Pacific Coast make contracts with other concerns in Shanghai, other than with the American Trading Company of Shanghai? A. Yes.

Q. All transactions with them are done in the same manner as with other companies?

A. Yes.

Q. When you make a contract with them it is done in the usual form? A. Yes.

Q. They sign indents just as if it was a separate concern entirely?

Objection by Mr. Fessenden.

Cross-examination.

(Questions by Mr. FESSENDEN.)

Q. Mr. Burns, your office here and yourself are under the supervision and control of the President and Board of Directors in New York? A. Yes.

(Testimony of Mr. Burns.)

Q. Absolutely? A. Yes.

Q. And the Board of Directors can employ a man to go into or work in your office, Tokyo, Yokohama, or any office they like? A. Yes. [201—35]

Q. And the employment—I understood you to say in the direct examination the President did authorize and instruct Mr. Steele to be employed through its San Francisco office? A. Yes.

Q. Did Mr. Steele telephone to you after he came here, as you heard him testify? A. Yes.

Q. He did? A. Yes.

Q. Did he ask you to pay him what?

A. No, I told him he had already started to sue us and as suit was in the court he could consult with our attorneys through his.

Q. Did you get any letters from him?

A. Yes.

Q. Did those letters refer to his employment with you?

A. They were referred back to the Tokyo office.

Q. You refused to answer them? A. Yes.

Q. They referred to—

A. I don't remember, I referred them back to Mr. Blake.

Q. If Mr. Steele had authority to work for you would you have taken him?

A. If Mr. Blake had formally sent Mr. Steele to me I would have done so under his instructions as my superior officer.

Q. If he didn't instruct you, you wouldn't?

A. No.

(Testimony of Mr. Burns.)

Q. As a matter of fact you had requested Mr. Blake not to send Mr. Steele and you didn't want Mr. Steele. [202—36] A. No.

Q. You also said a mistake had been made, and I understand by that you mean in the employment of Mr. Steele, before he was actually employed?

A. Yes.

Q. Under the instructions of the President at New York?

A. Yes. I didn't know it at that time.

Q. But you know it now? A. Yes.

Q. Now, how did you—since Mr. Steele has been over here have you told anyone that he was an Eurasian? A. No.

Q. Not anyone?

A. No. Only my attorneys.

Q. Have you ever told anyone—made the same charges against his ability or efficiency that you made here?

A. No, I can't discuss a case before it comes to trial.

Defendant rests.

Adjourned at 1:00 P. M. until 3:00 P. M.

REBUTTAL.

Testimony of Mr. Steele, for Plaintiff (In Rebuttal.)

Questions by Mr. FESSENDEN.

Q. Now, Mr. Steele, as a matter of fact are you of Eurasian blood?

(Testimony of A. T. Steele.)

A. Absolutely not. I have not a drop of Asiatic blood in my veins.

Q. What was the character of the actual services which you performed for the American Trading Company in Tokyo? [203—37]

Mr. BRYAN.—I object to all evidence attempting to show the character of the defendant's services rendered at Tokyo, that fact having already been determined on the pleadings.

The COURT.—Ruling reserved.

Eighth Exception.

To which ruling of the Court the defendant then and there excepted.

Q. What is the character of the services you performed in the Tokyo office? What class of work did you do?

A. I was practically manager of the financial department. Attended to the credits and collections and I was manager of the accounting department of the American Trading Company, Tokyo, and was head of that department with a number of men under me who did the bookkeeping and handled the details of the accounts of the company, and took care of the records and everything.

Q. Did your duties as performed involve the exercise of discretion?

Mr. BRYAN.—I wish a general exception noted to all such evidence.

Q. Were your services performed in the Tokyo office, did they involve any discretion?

A. In the capacity of manager a great deal of

(Testimony of A. T. Steele.)

discretion was vested in me. [204—38]

Q. During the time you served there in your exercise of that discretion did you at any time have occasion to question some of the accounts of other departments which were submitted to you as chief accountant?

A. Yes, sir, I had some occasions of that nature.

Q. Now, you say you did question some accounts which were submitted to you for your approval?

A. Yes, sir.

Q. What was your reason?

Mr. BRYAN.—I object on the ground that this evidence is irrelevant, immaterial and prejudicial to the case of the defendant, and further that this fact has already been determined upon the pleadings.

The COURT.—Objection overruled.

Ninth Exception.

To which ruling of the Court the defendant then and there took exception.

Q. Why did you object to some of the accounts?

A. Because I deemed myself responsible for the accuracy of the accounts of my department and certain statements were put before me in the capacity of manager of my department for endorsement and I declined to endorse anything that was not right.

Q. The COURT.—Put before you by whom?

A. By Mr. Moss, for example, the building department manager, was one.

Q. Any others besides Mr. Moss?

(Testimony of A. T. Steele.)

A. No, Mr. Moss, the manager of the building department was the only man whose statements I questioned and whose handling of his department I didn't want to endorse, as chief accountant.
[205—39]

Q. Just what do you mean, endorse?

A. He wanted to pass through our department incorrect amounts which he was not entitled to.

Mr. BRYAN.—I object to all evidence tending to show the character of the plaintiff's services in Tokyo, that fact having already been determined upon the pleadings.

Ruling reserved. The evidence will not be considered if it appears that you are entitled to judgment on the pleadings.

Tenth Exception.

To which ruling of the Court the defendant then and there excepted.

Q. By endorsement, just explain what you mean. Do you mean you had to sign these accounts as correct?

A. I had to O. K. those incorrect statements.

Q. After you had O. K.'d the statements were they sent to the head office in New York?

A. Yes, sir, and I didn't want to be identified with statements that were not absolutely correct and I declined to put my signature to them.

Q. When incidents like that occurred, did you refer them to Mr. Blake?

A. Yes, sir, on more than one occasion the differences which came up between the building de-

(Testimony of A. T. Steele.)

partment and my department.

Q. At any time while you were employed there did Mr. Blake, either directly or indirectly, criticize you?

A. Not a word of criticism as long as I was there, until April 30th.

Q. And the 30th of April was more than a month after you were dismissed?

A. Yes, after I wrote him a letter.

Q. And during the course of your employment there did you make recommendations which, in your [206—40] judgment, would tend to improve the system of accounts?

A. I certainly did.

Q. Did you submit those to Mr. Blake?

A. Yes, sir; in the form of a letter.

Q. Did Mr. Blake adopt them? A. No, sir.

Q. When you submitted those matters which you regarded would improve the system, did Mr. Blake take exception to your submitting them?

A. No, indeed, he expressed his approval of my recommendations, but said—

Q. At any time from the time you entered the employ of the Tokyo office of the American Trading Company up to the date you were dismissed—

A. Do you mean March 19th or April—

Q. When you actually got notice that your services were no longer required, had Mr. Blake or any other person in authority in the Tokyo office, informed you that your services were not satisfactory? Between the time you started work at the Tokyo office

(Testimony of A. T. Steele.)

and the time you received notice that your services were no longer required?

A. Not a word from anybody to that effect.

Q. Did Mr. Blake, or any man in charge of the Tokyo office, of the American Trading Company, inform you that they considered your conduct insubordinate there?

A. No, sir; not a word to that effect.

Q. Did anyone in authority in that office, anyone superior to you, ever criticise you or tell you you were not keeping proper office hours?

A. No. On one or two occasions Mr. Blake saw me [207—41] in the hall leading to my office and he had already come in, I think it was about a quarter of an hour or twenty minutes to nine, and he said, "Well, you are late," and I said, "yes, but it was on the Company's business."

Q. Now, as a matter of fact, during the period you served there, did you serve the full extent of the office period?

A. More than that. I didn't go to tiffin during the lunch hour of twelve to two. I was the only person in the office during the lunch period.

Q. About how long is that period?

A. From twelve to two. And during an illness I attended.

Q. You were ill?

A. Yes. Against the Doctor's advice, during the flu scare there. He advised me to stay at home, and I even attended the office during my illness trying to do my duty by the Company.

(Testimony of A. T. Steele.)

Q. When was the first time it was ever brought to your attention that Mr. Blake or anyone else in authority over you, were dissatisfied with your services?

A. The point of dissatisfaction was never mentioned to me by Mr. Blake.

Q. Never mentioned?

A. Never. Nor by anybody in the office.

Q. When was the first time that any claim that you had been insubordinate mentioned to you?

A. When I read Mr. Manley's affidavit was the first time.

Q. When you read it in this court? [208—42]

A. Yes, sir; the first time that I heard something about that.

Q. Now, when was the first time that you were informed you were considered a disturber of the discipline of the office?

A. When I read those affidavits. Nobody-ever told me that while I was there in Tokyo.

Q. Now, when you were dismissed by Mr. Blake were you ever informed that your services would not be required in Shanghai because of inefficiency or—

A. No, sir; neither verbally nor in writing did he ever say so.

Q. What was the reason?

A. The reason was that Mr. Burns had made arrangements with Mr. Manley to continue in the employ of the Company and as I was to replace Mr. Manley there was no need for me to go to Shanghai as I was not needed here.

(Testimony of A. T. Steele.)

Q. When was the first time you had any friction with Mr. Blake?

A. The first time was on the 30th of April.

Q. And you were dismissed on the 19th of March?

A. Yes, sir.

Q. And what gave rise to that friction?

A. I brought a cashier order with me for one thousand yen.

Q. You presented it to Mr. Blake?

A. I presented it to Mr. Blake because the manager of the Tokyo office declined to O. K. it, without Mr. Blake's indorsement.

Q. And what was your purpose for presenting this order? [209—43]

A. I had received a letter from Mr. Ward, or a cablegram from Mr. Ward to the effect that I was to await advice in Tokyo, and that was the understanding, you see.

Q. At the time you presented this order?

A. I wanted to await advices from Mr. Ward in Shanghai instead of Tokyo as they didn't want me there.

Q. You mean by that that you presented this order for funds to proceed to Shanghai?

A. Yes, and to wait there. I wanted about a month's salary—I figured about a thousand yen,—and await advice from Mr. Ward, in regard to the balance of my contract.

Q. And that is the first time, you say, any friction occurred? A. Yes, and he got annoyed.

Mr. BRYAN.—I renew my previous exception.

Noted.

(Testimony of A. T. Steele.)

Q. Sometime subsequent to your dismissal by Mr. Blake, you entered into negotiations with Mr. Blake to arbitrate your differences about this matter?

A. Yes, sir.

Q. Now, how were those negotiations conducted? Verbally or in writing?

Mr. BRYAN.—I object on the ground that the agree—[210—44] forth and admitted in the pleadings, cannot be changed by extraneous evidence.

The COURT.—Objection overruled.

Eleventh Exception.

To which ruling of the Court the defendant then and there excepted.

Q. Now, Mr. Steele, when negotiations were arranged for this arbitration were they conducted between you and Mr. Blake by correspondence?

A. Yes, sir.

Q. (Handing witness Plaintiff's Exhibit "F.") Now, Mr. Steele, take a look at that and tell us what it is.

A. This is a copy of a letter that I wrote to Mr. Blake, the Vice-president and General Manager of the American Trading Company.

Q. This is a copy of a letter you wrote to Mr. Blake?

A. Yes, embodying the understanding between Mr. Blake and I that—

Q. This is a press copy of your own handwriting?

A. Yes, sir.

Q. I will read this letter.

Mr. BRYAN.—I object on the ground that this

(Testimony of A. T. Steele.)

letter is not admissible in evidence because the agreement to arbitrate, as set forth and admitted in the pleadings, cannot be changed by extraneous evidence.

The COURT.—Objection overruled.

Twelfth Exception.

To which ruling of the Court the defendant then and there excepted.

Q. This is a letter you send dated May 2d, 1919, addressed to Mr. Ward. (Reads letter.) [211—[45]

Handing witness Plaintiff's Exhibit "G."

Q. And what is this?

A. This is Mr. Blake's reply to my letter confirming the subject matter to be arbitrated.

Q. You are familiar with Mr. Blake's signature?

A. Yes, sir. He signed it as Vice-president of the Company.

Mr. BRYAN.—I object on the ground that this letter is not admissible in evidence on account of the fact that the agreement to arbitrate as set forth and admitted in the pleadings cannot be changed by extraneous evidence.

The COURT.—Objection overruled.

Thirteenth Exception.

To which ruling of the Court the defendant then and there excepted.

Q. Now, Mr. Steele, after the exchange of these letters, were these letters submitted to the arbitrator, Mr. Potter? A. Yes, sometime later.

Q. Now, did you ever appear before Mr. Potter as an arbitrator? A. No, sir.

(Testimony of A. T. Steele.)

Q. Were you ever given an opportunity to appear in person before Mr. Potter? A. No, sir.

Q. Do you know whether Mr. Blake appeared before him in person or not?

A. I don't know personally, but I have a letter from Mr. Potter advising me that both of us would appear before him, but as I didn't appear, I presume that Mr. Blake didn't appear.

Q. Did you have a summons to appear before Mr. Potter? [212—46] A. No, sir.

Q. Did Mr. Potter ever give you any notice of any kind as to the manner in which you were to present your case to him? A. No, sir.

Q. You did give him a written brief?

A. Yes, sir.

Q. Was that at his suggestion?

A. It was at the Ambassador's suggestion to put my claims in the form of a brief. That was the first proceeding.

Q. What did you submit to the arbitrator—before we get to that, do you know whether Mr. Blake submitted a brief?

A. I do not know that he did, but I presume that he did.

Q. Did you ever see any brief submitted by him?

A. No, sir.

Q. Were you ever given any opportunity to testify before the arbitrator as to anything submitted by Mr. Blake? A. No, sir.

Q. Have you any knowledge whatever of what Mr. Blake submitted to the arbitrator?

(Testimony of A. T. Steele.)

A. None whatever.

Q. Now, what matters did you actually submit to the arbitrator? Just tell it briefly, what was the subject matter? You don't know what Mr. Blake submitted at all out the matter you submitted to Mr. Potter under this arrangement you had with Mr. Blake?

A. I submitted matters that related to my claim against the Company for breach of contract. [213—47]

Q. Of what contract?

A. Of the original contract with Mr. Ward in San Francisco, and my compensation in connection with it. The damages that should be paid to me for breaking that contract.

Q. You submitted the original contract that was signed by you and Mr. Ward? A. Yes, sir.

Q. And the compensation to be paid to you under that, and anything more? Just generally, the subject matter.

Mr. BRYAN.—I object on the ground that this is irrelevant and immaterial. (Withdrawn.)

(Handing witness Plaintiff's Exhibit "H.")

Q. Now, Mr. Steele, take a look at that and tell me what it is, please.

A. It is the original brief that Mr. Potter returned to me.

Q. Which you submitted to Mr. Potter?

A. Yes, and Mr. Potter returned to me.

Plaintiff's Exhibit "H" offered in evidence. Received without objection.

(Testimony of A. T. Steele.)

Q. Now, after you had submitted that brief, did you receive an award from Mr. Potter?

A. Yes, sir; I did.

Q. Have you that award?

A. (Plaintiff's Exhibits "I" and "J" offered in evidence. Received without objection.)

Q. After you received that award, did you abide by it? A. Did I what?

Q. Did you abide by it, did you consider you were bound by it? [214—48] A. I should say not.

Q. You did not? A. No, sir.

Q. Did you take legal advice on the question?

A. Yes, sir.

Q. You did? A. Yes, sir.

Q. Just one question more, Mr. Steele,—while in Tokyo were you ever accused of being an Eurasian by anyone?

A. No, sir. No one ever took me to be an Eurasian. It was a bolt out of the blue when I was accused by Mr. Burns of that to-day. Mr. Burns' statement that he got it from Mr. Ward is made out of whole cloth because Mr. Ward and I had to make out certain papers for securing a passport at Washington.

Objection by Mr. Bryan.

A. So far as I recall, your Honor, Mr. Burns said Mr. Ward told him I was an Eurasian, in San Francisco, and I say that statement was made out of whole cloth. It is not true and cannot be true because Mr. Ward assisted me in making out my papers, my application, and he also signed the

(Testimony of A. T. Steele.)

recommendations to the State Department at Washington to give me a passport, and he knew from the particulars I had to give to get that passport, my parentage, and I stated there that I was of American parentage, the son of John Tilton Steele, and that on both sides I came of American stock.

Cross-examination.

(Questions by Mr. BRYAN.)

Q. Mr. Steele, you had some trouble in getting a [215—49] passport?

A. I had no trouble. If there was any trouble it must have been with Mr. Chapin, the attorney of the company in Washington.

Q. I put it to you that your departure was delayed in San Francisco on account of the delay in getting your passport and you could only get it by Mr. Ward signing a personal guarantee?

A. No, sir.

Q. You deny that?

A. Absolutely. He had to sign the original papers, I believe, under the rules of the State Department in Washington. Clarence M. Smith was one and Mr. Ward the other.

Q. Now, in this brief that you filed with Mr. Potter, that sets forth all the facts on which you based your case, doesn't it?

A. In my case in court, no.

Q. Well, it sets forth the facts upon which you based your case before Mr. Potter? A. Yes.

Q. It was your contention as to your side of the arbitration?

(Testimony of A. T. Steele.)

A. Yes, from a layman's standpoint.

Q. Now, you received a notice from Mr. Potter to appear before him?

A. No, I didn't receive any notice to appear before Mr. Potter.

Q. I thought you testified on the direct examination that you had received notice to appear before Mr. Potter? A. No, sir.

Q. Did you ever ask Mr. Potter that you and Mr. [216—50] Blake appear before him at the same time and submit your verbal contentions orally? Did you ever ask Mr. Potter to do that? A. No.

Q. You never did? A. No.

Q. Now, Mr. Potter asked you to submit a brief. You raised no objection, you submitted your brief?

A. I submitted my brief, as I said before, in conformity with the Ambassador, Mr. Morris. That is what he suggested in the presence of Mr. Potter and I did what was suggested by the Ambassador.

Q. And you state that you never made any demand that you and Mr. Blake appear before Mr. Potter?

A. No, I was not in a position to demand. I was glad to get the matter arbitrated.

Q. Did you submit every contention from a layman's standpoint that you thought would help you in the matter, in your brief?

A. That would give Mr. Potter all the facts in the case so that he could reach a conclusion, or an award, with justice to both sides.

Q. In other words, this brief contained arguments as well as evidence? A. No.

(Testimony of A. T. Steele.)

Q. What did it contain?

A. The facts. All the facts I thought would be of value to Mr. Potter to give him an understanding of the case.

Q. All of the facts on which you based your side of the case? [217—51]

A. Of course subject to counsel's appearance and a proper handling of the matter.

Q. Didn't you have a lawyer in this matter?

A. Later, yes, when I was informed that Mr. Blake had an attorney, and there would be a contest in the Embassy in the presence of Mr. Potter, and he was very much disappointed that he could not come.

Q. According to this award you were awarded a certain amount of salary due to that date. Is that so?

A. Due to the time—as I remember, I was to be paid my salary in full until such a time as I could secure a passage to San Francisco.

Q. And Mr. Blake secured that passage for you and wrote you a letter stating that the passage had been secured? A. Yes.

Q. And you did not answer.

A. Why, yes, the matter was in the hands of my lawyer and he made the required answer.

Q. And you refused to carry out the award?

A. I should say. I was no door-mat.

Q. You refused to accept your salary due to the date of sailing and your steamship passage?

A. I declined that. I had received both a cablegram and a letter from Mr. Ward telling me to await

(Testimony of A. T. Steele.)

advices in Tokyo and I felt that was the proper thing for me to do, to await advices in Tokyo.

Q. You agreed to arbitrate the matter fully for these two contracts? [218—52]

A. No, I simply wanted a settlement on the original contract and I included the second contract to show that it was confirmed by Mr. Blake as Vice-president. For that reason alone.

Q. Yes, you agreed to arbitrate your differences as to both—

A. No, the differences were only in connection with my claim for the original contract.

Q. Then what contract?

A. The original contract.

Q. Oh, the three-year contract. And this award relates to this action? The same facts are in controversy in this action as were in controversy before the arbitrator? The same facts in this case and the facts as were brought out before are both the same. The same disputes. This dispute and the dispute before Mr. Potter were one and the same?

A. Yes, but the differences mentioned by Mr. Blake were in relation to my claim on the original contract. I demanded a settlement on that point.

Q. And you agreed to submit the settlement of your differences to Mr. Potter?

A. There were three points. One was the amount of compensation to be paid to me, second was the amount of bonus and third my passage back, and there was a difference in regard to the

(Testimony of A. T. Steele.)

payment of my compensation in Mex. dollars and the Yen, and we could not come to any agreement and Mr. Blake was quite annoyed about that.

Q. And the arbitrator awarded you the payment of your salary to the date of departure, and passage home? [219—53]

A. I would not call that document an award.

Q. Now, you stated that your services were entirely satisfactory from your view point, and you state you were only called to task on one occasion, about coming late to the office.

A. On one or two, and both times I was on the Company's business. One time to the bank and one to the Embassy.

Q. Is this right? (Reads:) "On three occasions the writer called Mr. Steele to task for his disregard of office rules and during one of these interviews told him that if he found it impossible to comply with our regulations he had better return to San Francisco. Notwithstanding our repeated admonitions, he still persisted in ignoring the office rules, and we submit that on this point alone we could have found sufficient justification for canceling his contract." Is that so, or not?

A. Absolutely not.

Q. Then Mr. Blake stated something that was not true, in stating that in his brief?

A. A downright falsehood.

Q. Now, Mr. Burns came through Tokyo sometime in February or March, didn't he?

A. Sometime in February.

(Testimony of A. T. Steele.)

Q. That was previous to the time that you were discharged by that letter of March 19th?

A. Yes, sir.

Q. Now, did you hear what Mr. Burns said, or what Mr. Blake said, regarding your efficiency or services rendered? Did you hear what he said?

A. At that time [220—54]

Q. No, here in the witness-box. Did you hear what he said? A. Yes.

Q. That was previous to your discharge, previous to this letter of March 19th?

A. Yes, sir.

Q. How do you know what was in Mr. Blake's mind?

A. Because I asked him, Mr. Blake, in his office, a few days after he, (Burns) left, I said, "I hope you gave me a good boost." He said, "I didn't have time to talk about anything, Mr. Burns was here such a short time."

Q. Do you deny, then, that Mr. Blake ever made any such statement to Mr. Burns?

A. Absolutely. Either Mr. Blake lied or Mr. Burns lied.

Q. You don't take into consideration that you are probably lying, do you?

A. I am on oath, sir.

Q. So was Mr. Burns.

A. I repeat that either Mr. Burns lied or Mr. Blake lied and I say that on oath.

Q. This contract says that the services rendered by you shall be satisfactory and efficient. Were

(Testimony of A. T. Steele.)

they? A. So far as I know, yes.

Q. Who shall be the judge as to whether the employees' services are satisfactory or not, employee or employer?

A. I don't think there was anybody in the Tokyo office to decide that point.

Q. In other words, you were more competent than anyone in the Tokyo office? [221—55]

A. There was nobody—

Q. You were the one man yourself, you tried to tell them, every other man in the office, how to carry on his own business, didn't you?

A. No, sir; I did not.

Q. And yet you say they were not capable to be judges of whether you were efficient or not?

A. No, sir; they were not.

Q. Do you say Mr. Blake is not competent to say whether or not your services were efficient?

A. No, sir.

Q. Well, he was in the Tokyo office, was he not?

A. Yes, sir, but he knew very little about accounting.

Q. You don't think he knew whether or not you were competent? A. I told him so.

Q. That was your opinion? A. Yes, sir.

Q. Mr. Blake was manager of the American Trading Company for the Far East? A. Yes.

Q. He had been there for some time? A. Yes.

Q. He was a man of wide and large business experience?

A. I don't know about being a man of wide expe-

(Testimony of A. T. Steele.)

rience, but he certainly had experience of the affairs of the American Trading Company, but very little in the matters of accounts.

Q. Did you ever write any letters to Mr. Ward regarding the affairs of the Tokyo office?

A. That was only—

Q. Answer my question. Did you or did you not. Did you ever write any letters to Mr. Ward [222—56] regarding the affairs of the Tokyo office?

A. Yes.

Q. You did? A. Yes.

Q. You knew at that time that the American Trading Company of the Pacific Coast was a different corporation? A. No, sir, I didn't.

Q. You knew that Mr. Ward had nothing *to with* the Tokyo office? A. No, sir, I didn't.

Q. You knew that he was not in charge of the Tokyo office? You knew he was not the president of the company?

A. I knew he was the vice-president.

Q. Well, you knew that he was not the president?

A. Of course.

Q. You knew he was not over Mr. Blake?

A. I thought he *was* over Mr. Blake.

Q. And you were writing letters to Mr. Ward regarding the affairs of the Tokyo office?

A. So far as I, in my position as chief accountant would consider—

Q. Who was your direct superior?

A. Mr. Mauger.

Q. And Mr. Blake was over Mr. Mauger?

(Testimony of A. T. Steele.)

A. Yes.

Q. And you thought you could write a letter to someone over Mr. Blake's head?

A. Why, I am a free agent, yes.

Q. You were a free agent? A. Why, sure.

Q. You could do anything you wanted to in that [223—57] position?

A. If it was justifiable, yes.

Q. You could come down late to the office?

A. No, sir.

Q. You could leave earlier than anybody else?

A. I was there, always, later than anyone else.

Q. You said you could do anything you liked?

A. Anything justifiable as I deemed proper, as the head of my department.

Redirect Examination.

(Questions by Mr. FESSENDEN.)

Q. What was the purpose of your writing to Mr. Ward?

A. The purpose was. During my work in the Tokyo office I observed a lot of things that were done that were not in the interests of the company, and so I thought as Mr. Blake didn't want me, and Mr. Burns didn't want me, that it would be a good chance for me to be chief auditor for the head office, and I thought Mr. Ward would use his best efforts to bring that about for me.

Q. You knew at that time—Mr. Ward has signed as vice-president for the American Trading Co.?

(Testimony of A. T. Steele.)

A. Yes, sir, and I thought he was superior to Blake.

Q. When you wrote those letters, or any letters, to Mr. Ward, was your intention actually in the interests of the company?

A. Yes, sir. I thought that I, or someone else, should be chief auditor to protect the interests of the company.

Q. What was the particular reason that you thought they needed protection?

A. For example, the stock account of the building [224—58] department was never verified. The balance of the stock on hand from time to time, period to period of six months were never verified. They were put in the books as being so much and God knows whether there was that much on hand or not, and Mr. Moss was taking commissions all the time regardless of the company's interests.

Q. As head of the accounting department of the Tokyo office you were of the opinion that things were going on there that were not to the best interests of the company?

A. If I were going to discuss the things I have in my possession I could say a great deal more.

Q. There were irregularities there?

A. Great irregularities there that I thought were my duty to bring to the attention of the head office. That was how I was the disturber of peace of some of them.

(Questions by Mr. BRYAN.)

Q. Mr. Mauger was in charge of the building de-

(Testimony of A. T. Steele.)

partment? A. No, sir, Mr. Moss.

Q. These irregularities, you say, were permitted by Mr. Moss or Mr. Mauger?

A. They were permitted by Mr. Mauger and prepared by Mr. Moss.

Q. Do you mean to charge these two men with a crime? A. No, sir.

Q. Well, what do you mean, then?

A. I mean that there were grave irregularities that were permitted by Moss in his department, without proper measures being taken to stop those things, and Mr. Mauger connived at it. [225—59]

Q. You say Mr. Mauger got more commissions?

A. No, Mr. Moss.

Q. Then he was doing something that was improper? A. Yes.

Q. He was your superior? A. He was not.

Q. Well, who was, then? A. Mr. Mauger.

Q. Did you call these things to the attention of Mr. Blake? A. I certainly did.

Q. What did he say?

A. He had some other ideas in his mind and probably preferred to let things slide.

Q. In other words, you were the one in the office that told everyone else how to do everything else, and how to act. A. No, sir.

Q. You objected to the conduct of your superiors.

A. No, sir, I merely protected myself against my superiors.

Q. Well, if Mr. Moss and Mr. Mauger—

(Testimony of A. T. Steele.)

A. Not Mr. Mauger.

Q. Well, can you suggest any reason why Mr. Blake should not put a stop to it?

A. I don't know what was in his mind.

Q. Do you suggest that he was also in cahoots with the rest of them? A. No, sir.

Q. What do you suggest?

A. It is not up to me to suggest.

Q. The natural inference is that he had something to do with it, isn't it?

A. Well, that is up to the Court to decide, not [226—60] up to me.

Q. Do you think it is proper for an employee to make statements of that kind against his employer?

A. I didn't make statements against my employer. Blake was not in charge.

PLAINTIFF RESTS IN REBUTTAL.

Mr. FESSENDEN.—I admitted that I had known Mr. Blake and Mr. Burns for a number of years, and they are men of high character. There is nothing in Mr. Steele's—it is not his intention to charge Mr. Blake, or anyone else, with misconduct.

Mr. BRYAN.—Plaintiffs admits that Mr. Mauser, Mr. Moss and Mr. Blake were connected with the Tokyo office at the time Mr. Steele was there and are men of the highest character and integrity, and men holding high positions in the American Trading Company, and are trusted employees thereof.

Adjourned, subject to call, at 4:35 P. M.

Before the Honorable Charles S. Lobingier, Judge of the United States Court for China, presiding at a session of the said Court in the City of Shanghai, China, commencing at 3:15 P. M. Wednesday, January 28, 1920.

Appearances:

JERNIGAN, FESSENDEN & ROSE, by Mr. Fessenden, for Plaintiff.

FLEMING, DAVIES & BRYAN, by Mr. Bryan, for Defendant.

Before proceeding with the testimony, defendant's counsel in open court, requests that on page 3 of the transcript, [227—61] seventh line from the top, the words "Objection overruled. Exception," be added after Mr. Bryan's objection.

Mr. BRYAN.—With your Honor's permission I move that I be permitted to withdraw my rest in rebuttal and call for further evidence in chief, Mr. Paget.

Application granted, there being no objection.

Mr. BRYAN.—I wish it to be expressly understood that *my* calling this evidence I do not in any way prejudice my rights in my motion for judgment under pleadings. I do not in any way admit that the facts that this witness will testify to are in issue.

Testimony of Mr. A. M. Paget, for Defendant.

Direct Examination.

(Questions by Mr. BRYAN.)

Q. What is your name?

A. Allen Maxwell Paget.

(Testimony of A. M. Paget.)

Q. Where do you live? A. Shanghai.

Q. How old are you? A. 35.

Q. Your occupation?

A. Assistant resident engineer.

Q. Are you connected with the American Trading Co? A. I am.

Q. Are you married? A. Yes, sir.

Q. You are an American citizen? A. Yes.

Q. Do you know Mr. A. T. Steele, the plaintiff in this action? A. I do.

Q. Where did you know him? A. In Tokyo.
[228—62]

Q. When were you last in Tokyo?

A. I left Tokyo Dec. 10th, 1919.

Q. What had you been doing in Tokyo?

A. Assistant resident engineer for the American Trading Company.

Q. How long had you been there?

A. About two years and three months.

Q. Now, were you in Tokyo in the employ of the American Trading Company when Mr. Steele commenced to work for the American Trading Company in Tokyo?

A. I was.

Q. Were you there when Mr. Steele left the employ of the American Trading Company?

A. I was.

Q. Were you in the employ of the American Trading Company during the whole time that Mr. Steele was in the employ of the American Trading Company in Tokyo? A. I was.

(Testimony of A. M. Paget.)

Q. Now, Mr. Paget, Mr. Steele has stated on the stand that there were certain irregularities in the accounts and books of the building department. Do you know whether or not there were any such irregularities?

Mr. FESSENDEN.—I object on the ground that this witness is not competent to testify.

The COURT.—Objection overruled.

A. I know of none.

Q. As a matter of fact did the building department keep any books other than records showing the amount of supplies on hand?

A. I know of no such records.

Q. In what department were you? [229—63]

A. In the building department.

Q. If there had been any accounts kept in this department would you have known about it?

A. I would have.

Q. What was the system in this office as to the paying out of money, by whom was it paid?

A. By the accounts department.

Q. By the accounts department by whose request?

A. By whose request? The manager of the department.

Q. How long were you at the Tokyo office?

A. About two years and three months.

Q. During this whole time you were in that department? A. In the building department.

Q. Are you acquainted with the rules and regulations of the office at Tokyo? A. I am.

(Testimony of A. M. Paget.)

Q. Were these rules and regulations brought about by general custom or were they in writing?

A. By general custom. They may be in writing, I have never seen the written instructions but we followed a regular routine.

Q. Were you in the office of the American Trading Company, Tokyo, previous to Mr. Steele's coming there? A. I was.

Q. Do you know of instances in which money had been paid upon the O. K. of managers of departments? A. Yes.

Q. Do you recall any of these instances?

A. I know in every case in which bills that the department had to pay, the manager would draw [230—64] vouchers and O. K. them. These would be sent into the accounts department and the accounts department would pay on the manager's O. K.

Q. Was the manager's O. K. ever questioned?

A. The custom of the office was not to question the manager's O. K. He was the authority in himself.

Q. Now, that was previous to the time that Mr. Steele came into the Tokyo office? A. Yes.

Q. Now, subsequent to the time that Mr. Steele came, were accounts and vouchers O. K.'d by managers of various departments paid by Mr. Steele without question?

A. You mean—before that Mr. Boyd was in charge.

(Testimony of A. M. Paget.)

Q. Well, subsequent to the time Mr. Steele came?

A. They were paid by the accountant without question so far as I am able to say; never heard of anything to the contrary.

Q. Now, did Mr. Steele ever question any of these vouchers? A. I understand he did.

Mr. FESSENDEN.—You mean you know of your own personal knowledge he did?

A. Yes.

Mr. BRYAN.—Now, whose vouchers did he refuse to pay?

A. I recall one instance in connection with Mr. Gage, that he refused to pay Mr. Gage's voucher until he had further information regarding it.

Q. Was this matter ever put before Mr. Blake?

A. That I cannot say. It must have gone to Mr. Mauger, at least.

Q. Do you know whether or not this particular item [231—65] was finally paid?

A. I have no doubt that it was, because I am sure that Mr. Mauger would not question Mr. Gage's O. K.

Objection by Mr. FESSENDEN. Sustained.

The COURT.—Do you know?

A. I do not.

Q. Now, what was Mr. Moss's position with the American Trading Company at Tokyo?

A. He was manager of the building department.

Q. How long had he been with the Company?

A. He came with the Company about 1910.

(Testimony of A. M. Paget.)

Q. Is he still in the employ of the American Trading Company?

A. He still is. If I may add further to that I have seen his signature on letters which have come from Tokyo within the last one or two weeks.

Q. Do you know anything about the Truscon Steele Company of Japan? A. I do.

Q. What is that Company?

A. It is an organization of American and Japanese capital. The American end of it, the stock is held by the American Trading Company and the Truscon Steele Company of Detroit. It is a company that has within the last year been organized to take over the business of the building department of the American Trading Company.

Q. Do you know who is the managing director?

A. Mr. Moss has been appointed the managing director.

Q. Mr. Steele has testified that there were some irregularities in the accounts of the building [232—66] department and that he got, and that there were some mistakes and irregularities in the commissions that he claimed. Do you know anything about that?

A. I know nothing about that.

Q. Would it be possible under the system in the Tokyo office for Mr. Moss to get more than he was entitled to in commissions?

Objection by Mr. FESSENDEN. Sustained.

Q. Do you know the system under which money was paid to the employees of the American Trad-

(Testimony of A. M. Paget.)

ing Company in the Tokyo office? A. Yes.

Q. State what that system was.

A. Do you mean salaries, bonuses, or commissions?

Q. Well, salaries, bonuses and commissions.

A. Well, of course with salaries, there was a regular system for paying salaries which men passed through on pay-day. Bonuses were figured up at the end of each six months' period, and with the heads of the departments they received according to their contracts certain percentages. With the junior men, their bonuses were figured out on on the profits of the department, on the salaries they received. That is it would be a months' salary, or two months' salary or six months' salary, depending upon the salaries of that department.

Objection by Mr. FESSENDEN.

Cross-examination.

(Questions by Mr. FESSENDEN.)

Q. You were a junior in the Tokyo office, weren't you?

A. I suppose you would call me that although we [233—67] didn't use that term there.

Q. Your real business was that of draftsman, was it not? A. No, sir, I am an engineer.

Q. You may be an engineer, but weren't you doing more drafting than engineering work?

A. No, sir, I was never a draftsman. There is a great difference between a draftsman and an engineer.

Q. Have you any personal knowledge as to the

(Testimony of A. M. Paget.)

arrangements between Mr. Blake, manager, and the head office, as to his commissions and—

A. Of course not.

Q. Have you any personal knowledge as to the arrangements between the head office—

A. I was not testifying as to commissions, I was testifying to the system, not as to the actual commissions, in all departments.

Q. What personal knowledge have you about that system as applied to anyone besides your department?

A. For the simple reason that the other departments system in doing business is absolutely the same.

Q. How do you know that?

A. Because men have told me.

Q. Men have told you? A. Yes.

Q. No personal knowledge?

A. I have never seen their contract and probably Mr. Steele hasn't seen their contracts.

Q. All you know about this outside of your own department is what you have been told by other men in the office, isn't it? A. Yes. [234—68]

Q. Yes, therefore your Honor, he is not competent to testify.

A. I testify that the system is exactly the same in the other departments as in the building department.

Redirect Examination.

(Questions by Mr. BRYAN.)

Q. By whom were bonuses, commissions and sal-

(Testimony of A. M. Paget.)

aries paid? Who signed the checks?

A. The accountant signed and the manager of the Tokyo office signed. All checks were signed by two men.

Q. And if there were any irregularities in commissions they must have been within the knowledge of the manager who signed the check?

Objection by Mr. FESSENDEN.

The COURT.—That is a matter of argument.

Mr. Bryan asks to have Mr. Steele excluded.

The COURT.—Overruled on the ground that he is a party and entitled to remain.

Q. Now, did you ever have any dealings with the accounting department? A. Yes.

Q. When? A. At various times.

Q. Did you ever have any specific dealings on any specific occasions?

A. On several occasions, yes.

Q. Did you ever have occasion to go to the accounting department to get a statement of any accounts? A. Yes, I did.

Q. When was that?

A. I do not recall the exact date.

Q. Well, about when? [235—69]

A. It was the early part of—

Q. Well, never mind about the time; what happened on that occasion?

A. I was detailed to settle a contract that we had to build a group of buildings and I sought the accounting department to give me a report of money paid to our sub-contractors and money received

(Testimony of A. M. Paget.)

from the owner of the group of buildings.

Q. Did you get that account? A. I did.

Q. Was it correct?

A. No, it didn't agree with the statement we had on record in our department.

Q. Did you go back and call this to the attention of Mr. Steele? A. I did.

Q. Was any excuse given for this mistake?

A. Of course Mr. Steele didn't make up the account, but he had detailed one of his men, and he called him and asked him why this discrepancy was made and to give him full information.

Q. What was Mr. Steele's manner in talking with this subordinate? A. Rather abrupt.

Q. Polite or otherwise?

A. Well, I suppose if he had been talking to me I would not have considered it polite.

Q. Did Mr. Steele ever make any statement to you as to his troubles with the American Trading Company? A. Yes.

Q. Where?

A. In the office, in my own home and in the street.
[236—70]

Q. Did he ever make any statements in public?

A. Well, if you would call the street public, yes.

Q. Did he ever make—were you present?

A. Yes.

Q. What was the substance of those statements?

A. They, well they referred to the way that the system was handled in this that the department managers O.K. was a final decision and accounts

(Testimony of A. M. Paget.)

would have to be passed through without any reference for any information; any further information available for the accountant.

Q. And he didn't like that?

A. No, he told me that he was an auditor and he thought that the auditor should have full information on all vouchers before they were paid.

Q. Was that previous to his leaving the company? A. Yes.

Q. About when was that?

A. Oh, I would say probably three or four months after he came to Tokyo, as near as I can recall.

Q. Did he ever make any other public statements, and where?

A. One Sunday afternoon in church he button-holed me and talked rather loudly about some of his troubles with the American Trading Company.

Q. What was the substance of that?

A. Along the same order.

Q. Were there any other people in the church?

A. Yes, the church was filled.

Q. Were there any other people in hearing distance?

A. Yes, there were people all around us.

Q. Did he ever make any other public statements besides those? [237—71]

A. Yes, in my own home.

Q. Who was present in your home when he made this statement?

A. We were having a dinner party.

(Testimony of A. M. Paget.)

Q. Were there any people there? Any who were not connected with the American Trading Company? A. Yes, there were.

Q. What was the substance of those statements?

A. Well, along the same order as before, trouble he was having with the system and the departments.

Q. That he claimed to be an auditor and not an accountant? A. Yes.

Q. Now, what else did he state at this dinner party that you gave?

A. He stated that Mr. Moss was not running his department in a fair way.

Q. Did he ever make any other statements that were derogatory to the character of Mr. Moss?

A. I do not recall. At that time, that evening, I know both Mrs. Paget and myself tried to turn the conversation off and it was somewhat embarrassing to us to have a guest bring up a business matter which had no interest to our other guests.

Q. Now, do you know of any other—did Mr. Moss, to your knowledge, ever have any unpleasantness with Mr. Steele?

Objection by Mr. Fessenden as leading. Sustained.

Q. What do you know about the services rendered by Mr. Steele to the American Trading Company at Tokyo?

A. I know that there was considerable friction [238—72] between Mr. Steele, Mr. Moss and Mr. Mauger, which probably tended to—

(Testimony of A. M. Paget.)

Q. Do you know what this friction was about?

A. Over the handling of accounts and the system of the—system of handling accounts for all the departments.

Q. Do you know whether or not Mr. Steele ever proposed a new system? A. Yes.

Q. Did he make any report—do you know whether or not he ever made any report as to a new system being put in? A. Yes.

Q. Was that report in writing?

A. Typewritten report, yes, typewritten report.

Q. Did you read that report?

A. Mr. Steele showed me a report. I am not sure whether it—I read it hurriedly. I am not sure whether this is the one he submitted to Mr. Blake for a new system or not.

Q. Do you know whether there was any difference between this system that he proposed and the system already in vogue?

A. I imagine there would be a vast difference.

Q. What was the difference?

A. I do not know; I never went into it at that time.

Q. Now, how long have you been in China, Mr. Paget?

A. I have spent about eight years in China. Before I went to Japan.

Q. What part of China? A. Canton.

Q. Do you know anything about the conditions in Shanghai as far as the difficulty or easiness with which employment may be obtained? [239—73]

(Testimony of A. M. Paget.)

A. From conversations I have had with men in various companies here—

Objection by Mr. Fessenden.

A. I do.

Q. Is it difficult to obtain employment in Shanghai if one desires to do so?

A. I do not think so.

Q. Do you know of any one that wants employees in this town? A. I do.

Q. Who? A. The Asia Bank.

Q. Anyone else?

A. The Grace China Co. These I have personal knowledge of. Other concerns may want someone; I do not know.

Q. In your opinion would it be difficult for a man out of employment to obtain employment in Shanghai?

Mr. FESSENDEN.—I object on the ground that his opinion is not admissible.

The COURT.—Objection sustained.

Q. Do you know whether or not there have been any new business concerns started in Shanghai recently? A. I do not know.

Q. Do you know what the conditions as to American business in Shanghai is at the present time?

A. What sort of conditions do you mean?

Q. Is American business on the up-hill climb or down-hill climb?

A. I would say on the up-hill. Of course new concerns here, some live and some die, but on the whole I think American business concerns are

(Testimony of A. M. Paget.)

[240—74] in far better shape, and there are more American concerns here now than there were a year ago.

Q. Would you say it would be easier to obtain employment here now than when you first came to China? A. Ten years ago? By all means.

Q. If a man really requires to obtain employment could he obtain it?

Mr. FESSENDEN.—I object on the ground that it calls for an opinion.

The COURT.—Objection sustained.

Fourteenth Exception.

To which ruling of the Court the defendant then and there excepted.

Q. Do you know whether or not Mr. Steele ever wrote for a paper? A. Yes.

Objection by Mr. Steele.

Q. Do you know whether or not Mr. Steele has ever obtained any money or revenue for writing articles for the papers?

A. Yes, in Japan he told me that he had received money.

Q. Does he write a good deal or not?

Objection by Mr. Fessenden, as leading. Sustained.

Q. What articles have you seen written by Mr. Steele in any newspaper in China?

A. Mr. Steele called my attention to one article he wrote for the North China Daily News, I think it is, but I didn't read the article, I didn't have time at the time.

(Testimony of A. M. Paget.)

Q. What was the article about?

A. I think it referred to a man as an Indian.

Cross-examination.

(Questions by Mr. FESSENDEN.)

Q. How long have you been in Shanghai?

A. Since the 15th of December. [241—75]

Q. Have you ever lived in Shanghai before?

A. Never before.

Q. Well, your information as to the possibility of people obtaining employment is *required* in Shanghai during that time? A. Yes.

Q. Now these statements Mr. Steele made to you in public, you say some were on the street?

A. Yes.

Q. Simply to you?

A. Mr. Budell and myself. He will probably recall—

Q. You don't intend to suggest that he was addressing the public at large, do you?

A. No, not purposely. Passers-by, they might have heard and they may have not.

Q. Just as anyone would have a conversation on the street?

A. Except that it was carried on in a loud tone of voice.

Q. Now you were not the head of the building department? A. No, sir.

Q. Relatively what was your position as compared to the head of a department?

A. Well, I came under the head, under the title

(Testimony of A. M. Paget.)

of assistant resident engineer, and Mr. Moss was originally resident engineer and he was raised to the title of department manager.

Q. Now were all checks submitted, as you submitted as a junior in your department, signed by the accountant?

A. All vouchers. The checks were signed by the accountant and by Mr. Mauger. [242—76]

Q. Did you pass your documents in to the accountant for verification?

A. Well, do you mean vouchers?

Q. Well, suppose your department wants to pay out something—would you pass your data into the accountant's department for verification or comparison?

A. Yes, I suppose, bills come in to be paid by the department—bills would be attached to the vouchers and sent to the accounts department.

Q. That was the common practice? A. Yes.

Q. Do you know, as a matter of fact, whether the accountant was accustomed to verifying these bills?

A. I do not think as a general system it was the custom of the accounts department to look into the matter so long as the departments O. K.'d the voucher.

Q. Under the system, so far as it related to your department, did the accountant, if he found a probable error, would he still pay it?

A. I suppose if there was an error, paying for

(Testimony of A. M. Paget.)

something we did not receive, the accountant would question it.

Q. Would you say, so far as your department was concerned, the accountant had any discretion whatever in passing your accounts?

A. The system as I understand, the manager's O. K. was sufficient for authorization for the account to be paid without Mr. —

Q. That is as far as you know. Have you any direct or positive knowledge as to the actual [243—77] authority of the accountant of the American Trading Company, under the system you mention?

A. His authority is to pay when authorized.

Q. Then you have a personal knowledge of instructions?

A. I have never seen written instructions. I have heard verbal instructions, in fact I know—

Q. Your department handled large sums of money, did they not? A. No.

Q. Small amounts?

A. We do not handle money except petty cash.

Q. Your department was accustomed to handling large transactions?

A. Large transactions, yes.

Q. And those large transactions were paid through the accounting department? A. Yes.

Q. Under the signature of the accountant and the manager? A. And the manager, yes.

Q. Under signature—

A. If the check was paid the accountant would

(Testimony of A. M. Paget.)

sign and the manager of the Tokyo office.

Q. Yes, and the checks would not be passed without the signature of the accountant, as far as you know. A. As far as I know.

Q. Now you mention the fact that Mr. Steele made some recommendations as to altering the system, now do you, did you see anything wrong in that?

A. As I stated before, Mr. Steele showed me, I am not sure whether that is the paper I recall. He showed me some letter that he had written, [244—78] and I do not know what was in it, that is I do not remember.

Q. That is, as I understand from your statement, recommending a change?

A. A change, yes. From his conversation I guess that he suggested a change in the method of accounting.

Q. That might make an improvement?

A. Yes, no I will take that back.

Q. According to his judgment?

A. According to his judgment, yes.

Q. How long have you been in the American Trading Company?

A. About two years and three months. I mean in Tokyo, about that time.

Q. Ever been any change or introduction of improvement of methods besides what Mr. Steele did?

A. Not to my knowledge.

Q. Do you know anything about accounts yourself? A. Not a thing.

(Testimony of A. M. Paget.)

Redirect Examination.

(Questions by Mr. BRYAN.)

Q. How long had Mr. Mauger been with the company?

A. Ever since he was a boy about sixteen.

Objection by Mr. Fessenden.

Q. Do you know what Mr. Mauger did before he was manager of the Tokyo office?

A. He was accountant in the New York office.

Testimony of A. T. Steele, for Plaintiff (in Rebuttal).

Direct Examination—Rebuttal.

(Questions by Mr. FESSENDEN.)

Q. Now Mr. Steele, you have heard what Mr. Paget [245—79] has said with regards to certain statements made by you in public. What have you to say, is that true or not? A. Not altogether.

Q. Well, you tell us your version.

A. In the first place, Mr. Paget referred to a conversation that I had with him, in a public street, Mr. Budell being present. I recall such a conversation and it took place one Sunday afternoon after church, and the conversation arose over something I said in regard to my trouble with Mr. Blake.

Q. When did this conversation take place, after you were discharged or before?

A. Oh, yes, after Mr. Potter had rendered his award, some time about the middle of June, 1919. I recall the conversation now.

Q. It took place after you had been discharged?

A. Yes, I would like to state what the conversa-

(Testimony of A. T. Steele.)

tion was because I remember it. I would just like you to know the facts exactly as they occurred. I felt aggrieved about the manner in which I had been treated by Mr. Blake. I said to Mr. Paget that I had rendered the company faithful and loyal service and that I was treated very badly and if head office would know all the facts relating to my case, it would realize that I had served the company faithfully and well. Then Mr. Paget said that Mr. Blake is the American Trading Company. I said, no, Paget, so far as you are concerned as you were engaged by Mr. Moss here, locally, Mr. Blake is the American [246—80] Trading Company, but I was engaged by the head office and I am a superior officer of the company, one of the heads of departments, a responsible man, a responsible chief.

Q. By that you mean of the accountant's department?

A. Yes, of the accountant's department, and so far as I was concerned Mr. Blake was only my senior officer and not my employer, and we went into the matters of the building department accounts, and I said that I didn't charge anybody in the office with being dishonest in any way, shape or manner, and Mr. Paget said, but you told somebody that we were a lot of crooks. I remember this conversation very well, your Honor. I said, Paget, no one but an idiot would talk like that and none but idiots would believe such nonsense. Do you imagine for a moment that I would call the

(Testimony of A. T. Steele.)

whole lot of you from Blake down, a lot of crooks? Well, he said, this is what was told to me. Well, I said, do you believe that I would say a thing like that? You know very well, Paget, that the only trouble between Moss, your boss, and I, is simply because I do not want to assume any responsibility in the accounts rendered by him that I am not sure are correct in every particular. The system of the company is such that the accountant is made responsible for matters that he has no cognizance of, and I am an old auditor, public accountant of San Francisco, and I have known cases where the poor accountant has been made responsible for the acts of their superior officers, and I am not going to be [247—81] caught napping here. Mr. Moss puts his O. K. on all sorts of statements upon the O. K. of Japanese subordinates; he has no time to look over things, and he signs those statements, O. K.'s upon the word of his chief clerk, then he passes them into my department to be O. K.'d, and in every case where the statement was right I never failed to endorse Mr. Moss' cash vouchers, or other statements that he sent in, but only in those cases where I found things were not right I saw to it that Mr. Mauger put his O. K. on first. That was the head and front of my offense while I was in the Tokyo office. The system was an old antiquated system, twenty-five years old, and as a modern accountant I could not make myself responsible without first going to my senior officer and making him responsible first, because if I had

(Testimony of A. T. Steele.)

passed the thing first, if there was any trouble later on and I was not in the Tokyo office Mr. Mauger or Mr. Moss might very well say well Steele was here and he O. K.'d it, and Mauger could say, I saw Steele's O. K. and I passed it. This was an old game, passing the buck and I was not going to be made a party to this business." That was one conversation I remember I had with Mr. Paget, and Mr. Paget will remember every word I said.

Q. Then Mr. Steele, these—many of these accounts you put your signature upon, were they ultimately sent to the head office in New York?

A. Every six months reports were sent to the head office, yes, and I was called upon to sign them [248—82] before they could be sent to head office because head office recognized me as head of their accounts department. So far as the head office was concerned, Mr. Blake was only technically responsible, I was responsible.

Q. Did you, at any time, stand upon the street and blurt out so passers-by could hear, what your trouble had been?

A. Well I will confess that I have a resonant voice but I didn't do it purposely to let anybody hear.

Q. I am asking you whether you purposely made any statements? A. No, I certainly did not.

Q. With the intention of making others hear?

A. I would not have even made this statement in court if they didn't make all sorts of charges in

(Testimony of A. T. Steele.)

that brief, but they forced me to tell these things in sheer self-defense.

Q. Mr. Paget mentioned one occasion where you declined to O. K. some account in his department; found some fault with it.

A. I never declined to O. K. it, without first going to Mauger. I had to put my initial on every cash voucher and every statement that came through my department. All my accounts have got to be signed by me but before I signed anything that I questioned, I went to Mr. Mauger and had him sign first, and in some cases Mr. Mauger didn't take it upon himself to sign but went to Blake to have him sign before he would sign. In many cases Mauger was afraid to sign—

Q. I will ask you about this,—we have heard all about that. Were these occasions in which you refused [249—83] to sign any more than the ordinary reasons for discretion—

Objection by Mr. Bryan. Objection sustained.

Q. Did you ever refuse to put your initial on an account?

A. At first I did, but finally I would have to put my initial after the senior officer had O. K.'d it.

Q. What was your reason?

A. My only reason for declining to put my initial on a statement or anything that would pass through my hands as chief, was because I could not verify it. I could not find anything in my office to hold myself responsible for it.

Q. That was the only reason?

(Testimony of A. T. Steele.)

A. The only reason. No personal reasons save and except in the interest of the company I would say "No, I won't initial this until somebody my senior would pass it, not before."

Q. Give the Court some idea what the volume of business passing you as accountant,—that is say during one month, can you say roughly the amount of checks you had to sign?

A. The business was tremendous. I remember there was an outstanding—

Q. Not anything about the outstanding, answer my question. I want to know if you can just state roughly the amount of money in checks you had to sign for the American Trading Company during the period of one month?

A. In the neighborhood of four million yen per month. Tremendous responsibilities, I had.

Q. You testified you had made certain efforts to [250—84] obtain employment in Shanghai. Have you ever advertised in the newspapers?

A. Yes, sir, I have quite a number of times and also have answered quite a number. I have copies of letters I wrote.

Q. How many?

A. I have applied to over 60 firms here personally.

Q. And you have not been able to find employment?

A. For the reason that men of my grade and capacity are not engaged out here.

(Testimony of A. T. Steele.)

Q. What do you mean by that, men of your capacity?

A. Heads of departments are not engaged here by any firms of any standing.

Q. You mean they are sent out from home?

A. Yes, sir. People of my position, as chief accountants, are not employed here. I have letters to that effect. Standard Oil Co. told me that and Stevenson & Carlson, certified accountants, also told me. I have a letter from Mr. Stevenson—

Q. The last witness said the Asia Bank and the Grace China Co.,—

A. I called in both these places and they didn't want a man in my position and requirements. I would want at least \$500.00 a month. A position of book-keeping, yes. I could get many a position as book-keeper but not as a chief accountant. Lots of positions as book-keepers are vacant here.

Q. Prior to the 19th day of March, which is the date Mr. Blake dismissed you, did you have any friction with Mr. Blake or any other head of the departments, or any man of responsible position in the company? [251—85]

A. Prior to the 19th day of March? Yes, if you call friction, as I described here, my going to Mr. Mauger every now and then to put the responsibility on him for the passing of certain vouchers and statements and reports to head office. If you call that friction, yes, I had quite a few of that kind, but everything passed very smoothly.

(Testimony of A. T. Steele.)

Q. Were your personal relations in the office pleasant?

A. So far as I know. Mr. Paget testified that my personal relations were—

Q. Did you have any knowledge of these charges brought against you prior to your dismissal?

A. Prior to my dismissal I didn't know anything of these charges of insubordination and inefficiency, etc., until I read Mr. Burns' affidavit. It was a bolt out of the blue. I never dreamed I would be charged with such.

Cross-examination.

(Questions by Mr. BRYAN.)

Q. Now, Mr. Steele, you say there are a great many positions as bookkeepers—

A. Yes, I think there are.

Q. You were a bookkeeper once, were you not?

A. I was never a bookkeeper.

Q. Didn't you ever keep books?

A. Never keep books in the way of a subordinate, never.

Q. You never kept books at all?

A. As a subordinate, never. I was a detailed public accountant duly qualified.

Q. You are a (?)—you don't keep books? [252—86]

A. That is the idea, now you have it.

Q. But bookkeeping is a branch of accounting?

A. Is a subordinate branch.

Q. But it is a branch?

A. Why, sure, the science of accounting includes

(Testimony of A. T. Steele.)

bookkeeping. If you don't know that you don't know anything.

Q. But you never filled a position as bookkeeper?

A. Yes.

Q. In Shanghai?

A. No, sir. I would not accept it.

Q. You wouldn't accept it? A. No, sir.

Q. But you could have gotten it if you wanted it?

A. I suppose so if I went out looking for a job of bookkeeping which are usually given to Portuguese and Chinese I understand, and I would not be bunched up with Portuguese and Chinese over here.

Q. You could not get anything that would put you in the position of the head of a department?

A. And in charge of books.

Q. You could have gotten something as a junior?

A. Probably, if I had made an attempt I might have gotten a job as a ledger keeper or a bookkeeper in some small concern.

Q. But you didn't try?

A. I certainly would not make any effort to get a position of that kind.

Q. As a matter of fact, Mr. Steele, you intend to return to the United States as soon as this case is settled, don't you?

A. I don't know, I never plan ahead of time.
[253—87]

Q. You don't intend to return?

A. I don't know what I am going to do. I haven't decided. I haven't made any plans.

(Testimony of A. T. Steele.)

Q. What are some of these sixty firms you have called on, who?

A. I will have to refer to my book, here.

Q. Well, refer to your book.

A. There was the China Realty Company.

Q. What sort of a position did you apply for there?

A. I asked Mr. Adams to help me to get a position.

Q. What did Mr. Adams say?

A. He said he would do the best he could for me, but he didn't have anything at that time for me.

Q. Now, previous to this time you had made some statements up to the American Club, of which Mr. Adams is secretary, regarding the inefficiency with which the club was run.

A. I made remarks?

Q. Yes, you.

A. That is absolutely not true.

Q. You never made any remarks?

A. I don't know how the club is run.

Q. I put it to you, that you have on several occasions made some remarks that were derogatory to the manner in which the club was run.

A. It is a deliberate lie.

Q. I put it to you that the Committee of the American Club held a meeting over you.

A. My God! is that so? It is news to me.

Q. Do you deny that?

A. Why certainly. I don't know anything about it.

Q. And you deny it? A. Yes. [254—88]

(Testimony of A. T. Steele.)

Q. And I put it to you that for that reason Mr. Adams never gave you a position in the China Realty Company.

A. That meeting might have been held because I claimed that the Portuguese bookkeeper overcharged me five or ten dollars on my bill and it was—I think it was settled fifty-fifty.

Q. So there was some controversy?

A. Yes, but that was over my bill.

Q. And there was some unpleasantness?

A. Not that I know of. Mr. Adams was very courteous and everything was all right.

Q. Who else?

A. Mr. Perkins of the Standard Products Co.

Q. What did they offer you?

A. He said he would have something for me by the end of the year and I have been busy on a job this month.

Q. Oh, you have been doing something, then?

A. Just only for two or three days now. I have just got something to do in Mr. Perkins office.

Q. How long have you worked in his office?

A. I don't work in his office.

Q. You said you did.

A. He gave me some reports to figure out to make a statement for him for the bank.

Q. Have you been paid? A. No.

Q. Any agreement?

A. No; he is an old friend of mine and I told him he could pay me anything he wanted.

Q. Who else did you call on?

(Testimony of A. T. Steele.)

A. Mr. Merriman, and he told me that it was very [255—89] difficult for a man of my age and experience to get satisfactory work here, and he didn't know of anything that he could offer me or that he knew of.

Q. In other words, he didn't know of any position in which you could be a head of a department?

A. Chief accountant or—

Q. Who else did you call on?

A. Mr. Fuller of the Thomas Simmons Company. He had nothing for me. If I had known anything about fire insurance he could put me in right away as he needed a man for fire insurance.

Q. Did you ever ask for anything other than chief accountant? A. No.

Q. You would not ask for anything else but head of a department—

A. I don't think I am called upon to take any position less than chief accountant at my age.

Q. Who else have you called upon?

A. I will give you a long list. Take your pencil and take it down. American Chinese Company.

Q. All right now. American Chinese Company. Result, find anything there?

A. Nothing doing there.

Q. No vacancy as chief accountant? A. No.

Q. Any other vacancies? A. No.

Q. Did you ask for anything else besides chief accountant? A. I told you no, I have not—

Q. As a matter of fact, the reason for you not [256—90] getting employment is that you have

(Testimony of A. T. Steele.)

refused anything but chief accountant?

A. Or accountant.

Q. That is the sum total of it?

A. That is the sum total.

Q. You admit if you wanted other employment, as bookkeeper, you could have gotten it?

A. I am not called upon to work for anything—an American accountant of San Francisco is not going to—

Q. Are all accountants that proud?

A. I hope they are as sensible, if not as proud.

Q. Now, I put it to you, Mr. Steele, that the system in the Tokyo office—

A. What do you mean by put it to me?

Q. Please don't interrupt me.

A. I want to know what you mean—put it up to me, that is slang.

Q. It means, I am asking you. Now, I put it to you that the system of the Tokyo office before you went there,—that when accounts were O.K'd. by managers of departments they were paid?

A. I don't know whether they were paid upon the O.K. of the department manager without the approval of Mr. Mauger. I don't think anything was paid. You are asking me something that is previous to my time.

Q. When you refused to O.K. accounts of the heads of departments, you had some trouble, didn't you?

A. I never refused to pay anything that was O.K.'d by the head of a department.

(Testimony of A. T. Steele.)

Q. You never refused to pay anything O.K.'d by the [257—91] head of a department?

A. No, unless I went to Mr. Mauger and got his approval first, do you see?

Q. You are quite sure about that?

A. Absolutely.

Q. Now, you tried to change this system so you could go into all the facts, didn't you?

A. No, sir.

Q. You wanted to go down into the bottom of it?

A. No, sir.

Q. You were not willing to take the word of the head of the department who put his O.K. on it?

A. In a great many instances I saw the statements and I certainly put my O.K.

Q. When the statement was O.K'd. by the head of the department, he took the responsibility of it, he was responsible? A. Technically, yes.

Q. Now, your duty was to put it on the books, wasn't it; to pay the account and put—

A. Not until I got Mr. Mauger's approval.

Q. Well, then you didn't have authority. You had to get Mr. Mauger's approval first, is that it?

A. Why, that was the regular routine, yes. Mr. Mauger was technically responsible for everything that went out of the Tokyo office and I was responsible for everything that went out—

Q. That was the system before you went there?

A. Yes.

Q. And you tried to change it?

A. I tried to protect myself. All I did was to

(Testimony of A. T. Steele.)

try to protect myself from the effects of that [258—92] system.

Q. Mr. Boyd never had any trouble, did he?

A. No, because he was an animated rubber stamp, and I refused to be that.

Q. In other words, you consider that you were more than an animated rubber stamp. You consider you were over the other department heads, was that it? A. No, sir.

Q. You considered that you could go beyond their heads?

A. No, sir, you are getting it all wrong, you don't seem to get the point.

Q. I don't think anybody else does.

A. Well, the Judge will.

Q. Now, have you ever got any money from the North China Daily News? For writing articles?

A. Yes, I received fifty, I think it was, fifty Mex. dollars.

Q. Are you quite sure that was all?

A. That was all.

Q. Absolutely sure about that? A. Absolutely.

Q. Now, then why did you state the last time you were on the stand, on Friday, I believe it was, that you had never received any money?

A. Oh, if you go back to my record you will find I referred to my accounting business, as a public accountant. So far as I recall I earned nothing. My writing has been my hobby for years and I never considered that as my source of revenue.

Q. But you got money for it? [259—93]

(Testimony of A. T. Steele.)

A. Yes, but it was always aside from my work.

Q. But that is getting money.

A. Yes, but I made particular reference to getting money from my business. I have never considered my writing as a business. It is just a hobby with me. I write at night, not in business hours.

Q. You got money from writing while you were in Tokyo, didn't you?

Objection by Mr. Fessenden. Overruled.

A. That was during the time I was in the Tokyo office, yes. I think Fleisher gave me thirty or thirty-five yen and I promptly sent it to the Tokyo Orphanage as my contributions. In fact all my earnings from writing are given in charity.

Q. Some of these articles you wrote caused quite a good deal of comment, didn't they?

A. I don't know.

Q. And on one occasion you were accused of being pro-German on account of some of your articles; isn't that so? And the matter was taken up by some of the good Americans and some of the British people in Tokyo and put up to Mr. Blake.

Objection by Mr. Fessenden. Overruled.

A. About two or three weeks after my arrival in Tokyo, before ever I wrote anything at all or even thought of writing anything, I was called into Mr. Blake's office and Mr. Blake very seriously informed me that somebody had told Mr. Moss that I was a pro-German and an Irish-American with pronounced anti-British views, and I told Mr. Blake it was ridiculous, that [260—94] he could

(Testimony of A. T. Steele.)

easily ascertain if I was a pro-German or anti-British by referring to the Embassy, and he telephoned to Commander Horne and asked Commander Horne whether or not any such report was made about Mr. Steele, and Commander Horne replied over the telephone that I was in good standing at the embassy. This is what Mr. Blake told me.

Objection by Mr. Bryan. Overruled. Exception.

And in connection with the charge that I was an Irish - American with pronounced anti-British views, I had written an article on India in which I had spoken favorably of British rule there and at about that time the British people at the Tokyo Club looked askance at me, and after reading that article their actions were entirely changed and they said to me, "Why, Mr. Steele, your friends at the American Trading Company have said all sorts of things about you. That article puts you entirely in the clear."

Mr. Fessenden offers plaintiff's Exhibits "H" to "I." Received without objection.

(Motion by Mr. Bryan.)

I wish to renew my motion as to judgment on the pleadings. I submit that I am entitled to judgment on the pleadings. I don't suppose Your Honor cares to hear me now.

The COURT.—At great length in your brief. You can start from to-day.

(Motion by Mr. BRYAN.) I move the Court to take depositions on behalf of the defendant, on commissions, of Mr. Mauger and Mr. Moss, regarding the system of doing business, and of O.K.'s questioned in the Tokyo [261—95] office, on account of the evidence brought out in the previous hearing and the evidence this afternoon.

The COURT.—Motion made by defendant's counsel for judgment on the pleadings. Ruling reserved. Motion for continuance to take further depositions overruled on the ground that the case was closed on January 23d, defendant having rested (See p. 37.), and was reopened by consent for the examination of one witness only. Neither at the time of the original hearing nor at the time of applying for the re-opening was any suggestion made as regards the taking of further depositions; and in view of the long time that has elapsed since the case was begun, the Court is of the opinion that the further delay incident to the taking of these depositions would not be justified.

Tenth Exception.

To which ruling of the Court the defendant then and there excepted.

The defendant is allowed three weeks from this date for the presentation of its brief, and the plaintiff is allowed three weeks from the filing of defendant's brief, or so much thereof as he cares to take, for reply.

ADJOURNED at 5:25 P. M. Subject to call.

The foregoing constitutes the testimony and state-

ment of all the testimony introduced and offered upon the trial of this cause. [262—96].

The foregoing constitutes the testimony and statement of all the evidence introduced and offered upon the trial of this cause.

And now on this 14th day of August, 1920, the defendant presents this, its bill of exceptions, and prays that the same be allowed, signed, sealed and made a part of the record herein.

FLEMING, DAVIES & BRYAN,

Attorneys for Plaintiff in Error.

JERNIGAN, FESSENDEN & ROSE,

Per S. F.

(Order Approving, Allowing and Settling Bill of Exceptions.)

The foregoing bill of exceptions is hereby approved, allowed, settled and made a part of the record herein.

CHARLES S. LOBINGIER,

Judge of the United States Court for China.

Filed Aug. 27, 1920. James P. Connolly, Clerk.
[263]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE,

Plaintiff,

vs.

AMERICAN TRADING CO.,

Defendant.

Petition for Writ of Error.

And now comes the American Trading Co., the defendant herein, and says that on or about the 20th day of April, 1920, this Court entered a judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, and of which will in more detail appear from the assignment of errors which is filed with this petition.

WHEREFORE this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court *for* Appeals for the Ninth Judicial Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

FLEMING, DAVIES & BRYAN,
Attorneys for Defendant.

Filed at Shanghai, China, Aug. 27th, 1920. James P. Connolly, Clerk. [264]

In the United States Court for China.

Cause No. —.

Civil No. —.

A. T. STEELE,

Plaintiff,

vs.

AMERICAN TRADING CO.,

Defendant.

Order Allowing Writ of Error.

This 14th day of August, 1920, came the defendant, by its attorneys, Messrs. Fleming, Davies & Bryan, and filed herein and presented to the Court its petition for the allowance of a writ of error, an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error, the defendant having given bond according to law in the sum of seven thousand five hundred dollars (\$7,500.00) United States currency, gold coin, which shall operate as a supersedeas bond.

CHARLES S. LOBINGIER,

Judge of the United States Court for China.

Filed at Shanghai, China, Aug. 27th, 1920. James
P. Connolly, Clerk. [265]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE,

Plaintiff,

vs.

AMERICAN TRADING CO.,

Defendant.

Assignment of Errors.

Now comes the defendant in the above-entitled action being the plaintiff in error herein and in connection with its petition for a writ of error makes the following assignment of errors which it avers occurred in the trial and decision of this cause in said court, to wit:

1st.

That the said Court erred in overruling the objections of counsel for plaintiff in error to the following testimony of the witness, A. T. Steele: (Bill of Exceptions, pages 3-5).

“Q. How do you know that?

Objection by Mr. Bryan. Objection overruled.

Exception noted.

A. A few days before the signing of the agree-

ment, Mr. Ward showed me a telegram which was signed by Sutcliff to the effect that—

Mr. BRYAN.—I object.

The COURT.—Ruling reserved; if the evidence proves to be improper it will not be considered.

First Exception.

Exception as to manner of ruling and as to admission of evidence.

Q. You say you saw a telegram, where did you see [266] that telegram?

A. It was in the private office of Mr. Louis A. Ward, vice-president of the American Trading Company.

Q. At what place? A. San Francisco.

Q. Do you know where that telegram is at the present time?

A. I think it is in the office of Mr. Ward.

Q. Are you familiar with the customs and practice of the American Trading Company?

A. Am I what?

Q. Familiar with the customs and practice of filing?

A. It is probably in the custody of Miss Versalovitch, private secretary to Mr. Louis A. Ward.

Q. Can you tell the Court the contents of that telegram?

Objection by Mr. Bryan.

A. Engage Steele as chief accountant Shanghai office subject to ten thousand dollars gold bond and his credentials being found entirely satisfactory. Sutcliff.

Q. Now, do you know what Sutcliff was?

A. Sutcliff, Mr. Ward informed me—

Mr. BRYAN.—I object to any conversations had by the plaintiff with Mr. Ward.

The COURT.—Objection overruled.

Second Exception.

To which ruling of the Court the defendant then and there excepted.

A. I know who Mr. Sutcliff is now?

Q. Who is he? [267]

A. He is the vice-president of the American Trading Company, New York, and executive head of the far eastern division of that company.

Q. Referring to that Company do you mean the defendant company?

A. The American Trading Company, New York.”

2d.

That the said Court erred in overruling the objections of counsel for plaintiff in error to the following testimony of the witness, A. T. Steele: (Pages 6-8 Bill of Exceptions.)

Q. Is this agreement? (Handing witness Plaintiff's Exhibit “C.”)

A. Yes, sir, this is the letter—the agreement that was executed between Mr. D. H. Blake, Vice-president and General Manager of the far east for the American Trading Company, and myself. Plaintiff's Exhibit “C” offered in evidence.

Mr. BRYAN.—I object on the ground that this exhibit is irrelevant and immaterial to the case.

The COURT.—Objection overruled.

Third Exception.

To which ruling of the Court the defendant then and there excepted.

Q. Now, in accordance with that agreement did you go to work for the American Trading Company in Tokyo? A. Yes, sir.

Q. And how long did you work there?

A. From the date of that agreement, August 27, 1918, to the time I handed over charge to the man who was replaced, Mr. Boyd, on May 3d, 1919. When I completed handing over charge to Mr. Boyd, [268] whose position I occupied during that time.

Q. Now, why were your services terminated at that time?

A. You mean my services in the Tokyo office?

Q. Your services with the defendant company?

A. They were terminated by my handing over charge to Mr. Boyd, whose position I was occupying pro tem.

Q. Yes, but why did you hand over the position to Mr. Boyd?

A. Because that was according to the terms of the agreement I had with Mr. Blake.

Q. Did you then proceed to Shanghai as under your original agreement? A. No.

Q. Why not?

A. Because Mr. Blake advised me by letter on the 19th of March, I think, that Mr. Burns, the Shanghai agent, had made arrangements with Mr.

Manley to remain in the employ of the company and he did not want me to come to Shanghai. Mr. Burns did not want me to come to Shanghai.

Q. Were you ready and willing and did you want to come to Shanghai and take up that employment? A. Yes, sir.

Mr. BRYAN.—I object.

The COURT.—Objection overruled.

Fourth Exception.

To which ruling of the Court the defendant then and there excepted.

Q. I hand you Plaintiff's Exhibit "D," and ask if [269] that is the letter you referred to in answer to my last question.

A. Yes, sir. That is the letter that gave me the intimation that Mr. Burns had made arrangements to retain Mr. Manley and he didn't want me to proceed to Shanghai. Yes, sir, that is the letter.

Q. Now, after receiving that letter what did you do?

A. I discussed the matter of my agreement with Mr. Blake.

Q. And was there anything done in regard to that?

A. He wrote a letter to Mr. Ward about it."

3d.

That the said Court erred in overruling objections of counsel for plaintiff in error to the introduction in evidence at the trial of said cause, of the following letter, being plaintiff's exhibit C and in admitting the same in evidence.

“Tokyo, Aug. 27th, 1918.

A. Tilton Steele, Esq.,

Present.

Dear Sir:

We beg to confirm our conversation of yesterday's date with reference to your temporary employment in this office.

Compensation: The compensation provided for in your original contract made with Mr. L. A. Ward, Vice-president and Manager of the American Trading Company of the Pacific Coast on May 27th calls for a salary of \$250.00 Gold per month, or a salary of not less than \$10,000.00 Gold for the three years' period of your contract. We have arranged that you are to receive \$250.00 Gold at exchange 50, which is the equivalent of Yen 500.00 per month together with an additional allowance of Yen 150.00 per month to cover any additional expenses which you may be put to owing to the change in your plans. The two items above mentioned will make a total of Yen 650.00 per month which you will receive while you are in employ of our Tokyo office.

Term of Employment: As explained to you, [270] we wish you to remain in Tokyo during the time that Mr. Boyd is absent on holiday which we estimate will be about six months. This time will, of course, apply on your three years' term as mentioned in your original contract.

Travelling Expenses. Any legitimate travelling expenses incurred by you on behalf of the company will be refunded to you.

General: It is understood between us that this

temporary arrangement does not prejudice any verbal understanding which you may have had with Mr. Ward or with Mr. Burns prior to your departure from San Francisco.

We remain, Dear Sir,

Yours very truly,

AMERICAN TRADING COMPANY.

(Sgd.) D. H. BLAKE,

Vice-president."

4th.

That said Court erred in considering Plaintiff's Exhibit "D" as part of the evidence in the case, the same having never been offered by the plaintiff as evidence, nor received by the Court as such, which said exhibit is as follows:

"Tokyo, March 19, 1919.

A. Tilton Steele, Esq.,

American Trading Co.,

Tokyo.

Dear Sir:

With reference to our conversation of a few days ago, we beg to confirm what we told you at that time, to the effect that we had received word from Mr. Burns, Agent of our Shanghai office, that as he had made satisfactory arrangements with Mr. Manley to remain with the Company, he did not want you to come to Shanghai.

We also confirm our statement that as soon as Mr. Boyd returns to his position in Tokyo, probably about the end of April, we shall have no further use for your services here.

We cannot say what your recourse will be under

your contract, but, as intimated the other day, the writer will be glad to render you such assistance as he can in order to effect a mutually satisfactory settlement,—but before anything can [271] be done in this connection it will be necessary for you to make some suggestions in the premises.

We remain,

Yours very truly,

AMERICAN TRADING COMPANY.

(Sgd.) D. H. BLAKE,

Vice-president.”

5th.

That the said Court erred in overruling the objections of counsel for plaintiff in error to the following testimony of the witness, A. T. Steele: (Page 9 to 12 of Bill of Exceptions).

A. We discussed my duties as chief accountant Shanghai office, and I told Mr. Burns that nobody in the office knew at exactly what rate of exchange I would get my salary and I wanted that settled before I left.

Mr. BRYAN.—I object.

The COURT.—Objection overruled.

Fifth Exception.

To which ruling of the Court the defendant then and there excepted.

Q. Was there anything more said at that time?

A. Yes, I asked Mr. Burns specifically to settle with me at what rate of exchange in taels or Mexican dollars I should be paid my salary, before I left San Francisco.

Q. What did Mr. Burns reply to that?

A. He said it was the—first I said that I understood that the usual rate of exchange was two Mexican dollars to one gold, and I would not accept anything less than that. Then Mr. Burns [272] said our office does even better than that, our special rate is 55 cents gold to the tael and all our American employees get their salaries on that basis.

Q. Was any memorandum made at that time of that conversation?

A. Then I asked Mr. Burns what that would amount to in Mexican dollars and he turned to a portfolio he carried and brought out a payroll sheet of the Company's Shanghai office and referred to it, and I happened to have some paper in my hands and he didn't have any loose sheets handy and I handed it to him to figure it out how much it would amount to at the rate of 72 taels cents for one Mexican dollar.

Q. Was there any memorandum made in writing at that time?

A. He figured out what my salary of \$250.00 gold dollars would amount to and it amounted to 632 Mexican dollars.

Q. Answer my question, please.

A. Yes, there was.

Q. Have you got that memorandum?

A. It is among those papers. ,

Q. You find it, please. I hand you Plaintiff's Exhibit "E" and ask if that is the memorandum made at that time.

A. Yes, Mr. Burns' own figures. He figured it out and said the amount was—he figured it out that

my salary would amount to 632 Mexican dollars.

Q. And whose writing is that? [273]

A. Mr. Burns'. Mr. Burns figured it out himself in pencil.

Q. Did you see him?

A. Yes, it was right there at that interview.

Exhibit "E" offered in evidence.

Q. In accordance with the terms of your contract with the defendant company you were to receive a salary of not less than 250 gold dollars a month. For how many months during the term of this agreement did you receive that salary?

A. I received that salary for nine months in Tokyo, at the rate of 500 Yen a month. Two yen to one gold dollar.

Q. And—

A. And I was given an extra allowance of \$150 a month as a compensation for the difference in exchange between 632 Mex. dollars, and I pointed out to Mr. Blake that my salary would be 632 Mexican dollars and he said he could not pay me more than 650 because Mr. Boyd, chief accountant of the Tokyo office, was getting that and that was the most he could pay me, and I accepted it.

6th.

That the said Court erred in overruling and denying the motion for judgment on the pleadings made by counsel for plaintiff in error at the close of the defendant in errors case, and before the plaintiff in error had called any evidence, upon the following grounds:

First. That the defendant in error in its reply

failed to deny allegation ten of plaintiff in errors [274] amended answer, thereby admitting that the services rendered by the defendant in error to the plaintiff in error were unsatisfactory, and that the defendant in error, in the performance of his duties, was inefficient, negligent and insubordinate to his superiors.

Second:—That, according to the procedure in force in the United States Court for China, all allegations of new matter made in the answer and not denied in the reply are considered as being admitted.

7th.

That the said court erred in not ruling upon the motion for judgment on the pleadings made by counsel for plaintiff in error at the time the same was made, and in the manner of its ruling, i. e., ruling reserved, and in permitting the case to proceed without first ruling upon said motion, and in not ruling upon said motion, before final judgment was rendered.

8th.

That the said court erred in the manner of its ruling, i. e. ruling reserved to the introduction in evidence of plaintiff in errors exhibits, 2, 5, 6, 8, 3 and 10 and in permitting said trial to proceed without first ruling upon the admissibility in evidence of said exhibits and in not ruling upon the admissibility in evidence of said exhibits before it rendered final judgment. Said exhibits are as follows:

Defendant's Exhibit No. 2.

May 10th, 1919.

Honorable William Potter,
c/o American Embassy,
Tokyo.

Dear Sir:

We acknowledge your letter of the 2nd inst., and wish to express our appreciation of your willingness [275] to arbitrate the differences which have arisen between our company and Mr. Steele. We further desire to record our appreciation of the good offices of his Excellency Ambassador Morris, which have resulted in your undertaking this task.

In the begining we wish to explain that it has never been our intention to evade our responsibilities or disregard Mr. Steele's rights under his contract.

The correspondence submitted will show you that Mr. Steele was originally employed on behalf of our Shanghai office, but later on he was held at Toyko to assume, temporarily, the duties of Mr. Boyd, while the latter took a short holiday.

In the meantime it developed that Mr. Steele's services were not required at Shanghai, and we at once began negotiating with him for the cancellation of his contract. In view of the fact that he had been originally employed by Mr. Ward in San Francisco, who was a personal friend of his, we recommended that the matter should be referred to him for settlement, and we had every reason to believe that this arrangement would be entirely satisfactory.

You will note that we gave Mr. Steele written notice that his services with this office would terminate on Mr. Boyd's return to Tokyo. He took no exception to this arrangement at the time, and in fact as late as April 29th, he told the writer and Mr. Mauger, the agent of the Tokyo office, that he would turn over his duties to Mr. Boyd the following day. This, however, he failed to do notwithstanding our repeated requests. Owing to his arbitrary and unwarranted actions our business was seriously interfered with for several days.

As an instance of the inconvenience we were subjected to we would say that our accountant's safe remained closed for two days, during which time we were deprived of the use of our securities and other important documents.

During this time we had agreed to Mr. Steele's demand for an arbitration so we contend that there was no ground for his arbitrary and illegal action.

We might point out that Mr. Steele's rights under his contract would have been just as secure without this "hold up" and we feel sure you will agree with this statement.

We would finally put on record that it was not until the 8th inst. that Mr. Steele handed over the last of the keys which were in his possession.

We now come to the character of Mr. Steele's work while he was in the office. He adopted the attitude from the start that our system of bookkeeping was all wrong, and this of course led to more or less friction and unpleasantness.

During the first few months of his stay here his attendance on the office was so irregular as to cause great hindrance to our business. It very frequently happened that he did not turn up at the office until 9:30 o'clock, sometimes 10 o'clock, or even later—this in spite of the fact that a notice is posted that our office hours are from 9 o'clock.

If required we can offer numerous witnesses to prove the correctness of the above statements.

On three occasions the writer called Mr. [276] Steele to task for his disregard of our office rules, and during one of these interviews we told him that if he found it impossible to comply with our regulations he had better return to San Francisco. Notwithstanding our repeated admonitions he still persisted in ignoring the office rules, and we submit that on this point alone we could have found sufficient justification for cancelling his contract.

We now wish to discuss Mr. Steele's unauthorized correspondence on affairs pertaining to our office.

We enclose copies of his letters of April 17th and April 24th addressed to Mr. L. A. Ward of San Francisco.

These copies are certified to us by Miss Paul who was our stenographer at the time they were written, but who has since left our employ. She is, however, still in Yokohama and would be willing to answer any questions if called upon to do so.

Mr. Steele told the writer that he had addressed certain letters to Mr. Ward, but never mentioned their character; he also intimated that he had taken

an extra copy for our files, but at the same time never offered to hand them over.

We now have every reason to believe that his apparent willingness that we should see this correspondence was pure camouflage as it must be apparent to anyone that had we seen the letter of April 24th, it would never have left our office.

Since the beginning of this month we have repeatedly asked Mr. Steele, both verbally and in writing (see copy of our letter of May 6th), for copies of this correspondence with Mr. Ward, but up to this writing he has failed to comply.

We might explain that the addressee of these letters is the Vice-president and General Manager of the American Trading Company (Pacific Coast), a Company with which we are associated, but which is a separate and distinct organization.

Mr. Ward has no jurisdiction over this office and is not even an employee of the American Trading Company proper.

We do not even intimate that Mr. Ward was a party to this clandestine correspondence and we even believe that he will disavow any connection with it.

We do not know how many more letters were written or the nature of their contents, but the opening paragraph of the letter of April 17th furnishes proof that there were others. This paragraph also shows that Mr. Steele was keeping Mr. Ward advised of "developments."

We should also like to call your attention to the first paragraph of the letter of April 24th in sup-

port of our statement that we thought Mr. Steele was agreeable to handing over his duties to Mr. Boyd on the latter's return.

We do not undertake to deal in detail with the balance of the subject matter of this letter, but we might remark that against Mr. Steele's eight months service in the Company the men who he subjects to such severe criticisms and innuendoes have the following records:

Mr. Blake, 23 years; Mr. Mauger, 20 years; Mr. Boyd, 17 years, and Mr. Moss, 9 years.

We would further mention that Mr. Mauger previous [277] to coming to Tokyo, was chief accountant of our company in New York for a number of years, and is, presumably, as capable a man on books as Mr. Steele, and also has the welfare of the Company quite as much at heart.

We submit that Mr. Steele in carrying on such correspondence was practicing both deception and treachery, and on either count he has committed an unpardonable offense.

If he acted with a realization of what he was doing then certainly he has no excuse to offer, but on the other hand if he pleads ignorance, he convicts himself of being deficient in the most elementary principals of business.

It seems incredible that any man endowed with ordinary intelligence could *do* abuse the confidence of his employers as Mr. Steele has done in carrying on this correspondence.

We would respectfully submit for your consideration the following points:

1. Would Mr. Steele have been justified in writing such a letter as that of April 24th, even to the head office of the Company, without the knowledge and consent of his superior officer?

2. Assuming for argument's sake that your answer to the above is in the affirmative, would he have been justified in sending the same letter to a man who had no connection whatever with the office which employed him?

3. Having committed this offense has he not proven himself irresponsible and untrustworthy?

4. In view of all the other facts, would we not have had good and sufficient grounds for dismissing him from our office?

In conclusion we have to say that under ordinary circumstances we would have had no other thought than to treat Mr. Steele liberally, but in view of the unsatisfactory character of his work and the treachery he has displayed toward his office and employers, we now prefer that the case be settled entirely on its merits.

Respectfully submitting the above, and with renewed thanks for your kind assistance, we remain,

Yours very truly,

Defendant's Exhibit No. 5.

April 24, 1919.

Mr. A. L. Ward,

Vice-Pres. & Gen. Mgr.,

American Trading Co. (Pacific Coast)

San Francisco.

My dear Mr. Ward:

I am just informed that Mr. Boyd [278] will

be here on Monday next, and I shall have to hand over charge of the account department to him on the first of May.

I expect the auditor's report in any day now, and judging from what Mr. Bell has told me I believe that his firm will not certify to the correctness of the account except in a modified form unless and until a thorough investigation of the accounts of the building department has enabled him to verify certain stock balance carried forward to 1919.

Such an investigation would entail a great deal of time, labor and expense, and I have my doubts as to whether Mr. Blake would deem it advisable to incur this expense, particularly at this time, when he is busy organizing a new company to take care of the Truscon Building material interests as a separate concern.

I fully realize the inexpediency of going into the accounts of our building department at this time, as any trouble which may arise out of the investigation would perhaps prejudice the interests of the company in this new enterprise.

Be that as it may, I am sure that were the actual facts in their entirety relating to the accounts of the building department known to the head office they would agree with me that an investigation was very necessary. As Mr. Blake remarked to me when I called his attention to the fact that the Kahn materials stock had never been verified and that account sales were made up and passed into our books upon the O. K. of Mr. Moss, that Mr. Moss practically fixed a profit on each job and

thereby his commission as well, the accountant having no authority to question or to supervise his figures, that "such a situation would be positively alarming" were it not for the utmost confidence he had in Mr. Moss' integrity and knowledge of the business.

I have not completed my special report to Mr. Blake on the subject of the existing conditions in the accounting department, and I feel from the way he has treated my suggestions in regards to collections that it would be labor lost were I to continue my efforts in that direction, and I am the more led to this conclusion after a conversation which I had recently with Mauger. This being so, I shall probably go to Shanghai and shall await your advice there instead of here, unless of course after Mr. Boyd arrival here I see a disposition on the part of Mr. Blake to carry out my suggestions to the end of utilizing my services in the Tokyo office for at least the period covered by my contract with the Company.

That the Tokyo accounting department needs to be reorganized upon a modern basis is admitted by Mauger, who says in this connection that he and Boyd have been talking about it ever since he came from the Philippines in 1917, but from the time I have been here both Mr. Blake's and his attitude have been to defer any action to the end of improving conditions in the accounting department until Mr. Boyd got back, and now that Mr. Boyd will soon be here I expect that Mr. Blake will tell me that these improvements can be affected by Mauger and

Boyd, without having another [279] high-priced accountant to collaborate with them. Upon this point I shall have something to say, and it is possible that what I will say will not be entirely acceptable to Mr. Blake or to Messrs. Mauger and Boyd—but I want to assure you that whatever I might say or do in this connection will be prompted by only one thought, actuated by one *one* motive, that it is better serve and safeguard the interests of the company than they have been in the past.

Each department there appears to have a separate organization as if those departments were distinct entities or concerns subsidiary to the parent organization in New York but operating independently, as it were, of each other, the accountant department of the company being used merely to record their transactions to receive and disburse monies, borrow funds to carry on the business, to retire their drafts, to investigate the financial standing of their customers and to hold in their behalf the securities deposited by these customers, without, however, any right, title or authority to look into the affairs of their respective departments. This arrangement often causes confusion between the accountant department and the other departments.

For example, the other day a check for about nine thousand yen came in by registered mail, was handed over by me in the usual course to our credit man, who went with it to the department where it belonged to get the requisite paper memos for purposes of record and receipting, and the check was duly deposited on that day. Two weeks later

the head of that department comes in to me and says that in response to his request a settlement from the company he had been informed that payment had already been made and he did not know anything about it.

This sort of thing happens very frequently due to the fact that there is not proper co-ordination of functions between the sales managers, departments and the accountant, and too much duplication of records, too much unnecessary clerical work done by all departments concerned, when the accountant's department, if properly organized could handle everything to the entire satisfaction of all departments concerned.

I am merely touching upon the general condition existing. To go into details with you would be a voluminous task and furthermore would necessitate your being here to see things in operation, and if you were here you or any keen up-to-date American business man familiar with American methods would be forced to come to the same conclusion as I have.

Hoping to hear from you in answer to my letters of last month before I leave here, which will be by the first boat I can get passage on to Shanghai, I remain,

Very sincerely yours,

I hereby certify that the foregoing letter is an exact copy as indicated by Mr. Steele and as taken from my stenographic notes.

Witness:

_____, [280]

Defendant's Exhibit No. 6.

April 17, 1919.

Mr. A. L. Ward,

Vice-President and General Manager,

American Trading Co. (Pacific Coast)

San Francisco.

Mr. dear Mr. Ward:

Since addressing you last there have been no new developments to advise you of.

The conference with Messrs. Bell & Taylor took place some days ago, and they are apparently still considering matters, for their report and statements are not forthcoming as yet. As soon as they come to hand and Mr. Blake is made aware of the actual condition existing I shall make my special report to him and await his decision.

Perhaps the enclosed clipping may be of some interest to you and I might mention that I am doing considerable writing for various newspapers and magazines, both in California and here in Japan, and I have spoken to Mr. Blake on the subject and he thinks that there would be no objection to my doing this, provided I did not sign my name to those writings—and I have agreed with him that it would be advisable in view of the fact that the ideas I have expressed and shall express while I am here in the Orient may prove very unpalatable to the average oriental man.

As regards Mr. Boyd's return, nobody here knows just when he is coming back, but I suppose before he leaves San Francisco, he will see you and you will know exactly when he is leaving.

Awaiting your advice with much interest, I remain,

Yours very sincerely,

I hereby certify that the above is an exact copy of the letter dictated to me by Mr. Steele, as taken from my stenographic notes.

Defendant's Exhibit No. 8.

May 6, 1919.

A. T. Steele, Esq.,

5 Enokizaka-machi, Akasaka,
Tokyo.

Dear Sir:

I shall be obliged if you will kindly furnish me with certified copies of all letters which you have addressed to Mr. Ward, during the time you have been connected with this office, which in any way refer to the business of the office. [281]

Your prompt compliance with this request will no doubt hasten the arbitration of our differences, and as that would no doubt be in keeping with your ideas I hope you will not delay complying with my request.

I would also be glad to have you state to me in writing whether or not you sent to Mr. Ward a copy of our last auditor's report.

I have again to remind you that you have failed to turn over a number of keys which are urgently required by us. I understand that the desk in our office for which you hold the key contains only your private belongings, but I would call to your attention that this fact does not offer any excuse for your

retaining possession of our property. Kindly let us have all of our keys at once.

I enclose herewith an account current showing that you have a debit balance of Yen 541.21, on our books, which we request that you pay in at once. I remain,

Yours very truly,

Defendant's Exhibit No. 3.

Tokyo, March 19, 1919.

D. H. Blake, Esq.,

Vice-Pres. & Gen. Manager,

American Trading Co.,

Tokyo.

Dear Sir:

Re My Three Year Contract with the Co.

Replying to your letter of yesterday's date, I beg to confirm the understanding we came to at the close of my interview with your good self yesterday on the above subject.

That I did not feel disposed to come to a final decision on the matter without consulting Mr. Ward, who, with the knowledge and assent of Mr. Burns, made the above-mentioned contract with me.

While I deeply appreciated your offer of mediation and was sincerely confident of receiving the fullest consideration at your hands, I could not make up my mind on the subject without first hearing from Mr. Ward.

Your concurrence with me on this point made the situation so much easier for all concerned, and I am sure I left the impression with you that I had concluded that I was determined in fact to have

this unfortunate affair with the company adjusted in an amicable rather than a contentious spirit.

Since writing the above I have received [282] a copy of your letter to Mr. Ward No. 46F, which was addressed to him by you in keeping with our conversation.

Would you permit me to make clear a passage in that letter which is somewhat ambiguous, I refer to the part wherein you say that Mr. Steele is not altogether satisfied with life in Japan and that he is not sorry that his stay here is not to be postponed.”

This may be construed by Mr. Ward to mean that I am not in favor of serving the Company in Japan. With your kind permission I would like to state briefly that I have already told you, in this connection, that I had reference to my *business life* in Japan, as a member of the Tokyo organization of the Company *under existing conditions*. Those conditions, as you are aware, tend to make the accountant of the Tokyo office virtually, if not verbally, subordinate in matters of accounting to the heads of the other departments, import, engineering and building, a situation which in my opinion no self-respecting experienced American Accountant could endure for any great length of time.

However, this is not the time for details—suffice it to say, and I sincerely trust that you will take what I say in good part, that in matters relating to accounts and collections (not to mention anything else) our office needs to be thoroughly reconstructed, i. e., reorganized along modern lines, to meet the needs and requirements of the post-war competition

that other large organizations like ours in Japan are preparing for.

Of course, Japan is not America—we all realize that, and local conditions will have to be met, but the science, of accounting, as practiced in the United States to-day, is based on “common-sense” and an expert accountant trained in the United States school of practical accounting, no matter where he goes or what business he is engaged to serve, may safely be trusted to find a practical solution to every problem that arises in his line—if *he can be given the requisite authority and encouragement to operate in his particular field of work.*

I trust my special report when it is completed, will prove of sufficient merit to receive your endorsement, and I need hardly add in this connection that the approval of a gentleman of your wide business grasp and experience would be highly valued by me.

Very respectfully yours,
(Sgd.) A. TILTON STEELE. [283]

Defendant's Exhibit No. 10.

March 19, 1919.
Letter No. 46-F.

L. A. Ward, Esq.,

Vice-president American Trading Co. (Pacific Coast).

San Francisco, Cal.

Dear Mr. Ward:

I enclose herewith copy of letter which I have to-day addressed to Mr. Steele.

You will perhaps not be prepared for the news

that Mr. Steele is not going to Shanghai to our office at that port. I presume that when Mr. Burns went through San Francisco this matter was not discussed with you, because Mr. Burns thought at that time that Mr. Steele would replace Mr. Manley after the return of Mr. Boyd to Tokyo from his short holiday. In the meantime Mr. Burns has made satisfactory arrangements with Mr. Manley and desires to continue his services with the Company—and that being the case, he has no position for Mr. Steele.

I had explained the whole situation to Mr. Steele and I think he fully understands the reason for the action which has been taken. I am pleased to say that he has accepted the situation very gracefully indeed and is quite willing to come to a friendly understanding with the American Trading Company.

I have suggested that in view of the fact that his contract was made with your good self, he return to San Francisco in due course and come to a settlement with you, and he has been very agreeable to this suggestion.

I think I am correct in saying that Mr. Steele is not altogether satisfied with life in the Far East, and that he is not sorry that his stay here is not to be prolonged even to the extent of the contract which he entered into. He is, however desirous of obtaining some kind of a Government appointment in India, and he tells me that you were fully acquainted with his wishes in this respect at the time you entered into negotiations with him on behalf of

the American Trading Company. He would like us to render him such assistance as we can to enable him to get such an appointment, and I have told him that we would provide him with such letters of recommendation as we could, but beyond that I cannot see that we can be of any material assistance. However, I hope that you will do anything that you are able to do in his behalf.

I cannot say at this writing just when Mr. Steele will return to San Francisco, but I am expecting that Mr. Boyd will be back here not later than the end of April, and in that case probably Mr. Steele could get away from here sometime during May.

I am giving Mr. Steele a copy of this letter, I remain,

Very truly yours, [284]

Enclosure.

P. S. Since writing the above, Mr. Steele has called my attention to the fact that my remarks with reference to his not being satisfied with life in the Far East are not exactly in accordance with facts. His proposition is that he is not pleased with life in Japan, but that as far as China is concerned he believes that he would have been entirely satisfied to have completed his contract in that Country, D. H. B.

9th.

That the said court erred in permitting the following testimony of the witness, A. T. Steele, to be admitted in evidence over objections of counsel for plaintiff in error and in its manner of ruling, i. e., ruling reserved, and in not ruling upon said evi-

dence, and in permitting said trial to proceed without first ruling upon said objections and in not ruling upon said objections before rendering final judgment; (Page 37 to 44 of Bill of Exceptions).

“Q. What was the character of the actual services which you performed for the American Trading Company in Tokyo?

Mr. BRYAN.—I object to all evidence attempting to show the character of the defendant’s services rendered at Tokyo, that fact having already been determined on the pleadings.

The COURT.—Ruling reserved.

Eighth Exception.

To which ruling of the court the defendant then and there excepted.

Q. What is the character of the services you performed in the Tokyo office? That class of work did you do?

A. I was practically manager of the financial department. [285]

Attended to the credits and collections and I was manager of the accounting department of the American Trading Company, Tokyo, and was head of that department with a number of men under me who did the bookkeeping and handled the details of the accounts of the company, and took care of the records and everything.

Q. Did your duties as performed involve the exercise of—

Mr. BRYAN.—I wish a general exception to be noted to all such evidence.

The COURT.—Ruling reserved.

Q. Were your services performed in the Tokyo office, did they involve any discretion?

A. In the capacity of manager a great deal of discretion was vested in me.

Q. During the time you served there in your exercise of that discretion did you at any time have occasion to question some of the accounts of other departments which were submitted to you as chief accountant?

A. Yes, sir, I had some occasions of that nature.

Q. Now you say you did question some accounts which were submitted to you for your approval?

A. Yes, sir.

Q. What was your reason?

Mr. BRYAN.—I object on the ground that this evidence is irrelevant, immaterial and prejudicial to the case of the defendant, and further that this fact has already been determined upon the pleadings.

The COURT.—Objection overruled. [286]

Ninth Exception.

To which ruling of the court the defendant then and there took exception.

Q. Why did you object to some of the accounts?

A. Because I deemed myself responsible for the accuracy of the accounts of my department and certain statements were put before me in the capacity of manager of my department for endorsement and I declined to endorse anything that was not right.

Q. (The COURT.) Put before you by whom?

A. By Mr. Moss, for example, the building department manager, was one.

Q. Any others besides Mr. Moss?

A. No, Mr. Moss, the manager of the building department was the only man whose statements I questioned and whose handling of his department I didn't want to endorse, as chief accountant.

Q. Just what do you mean, endorse?

A. He wanted to pass through our department incorrect amounts which he was not entitled to.

Mr. BRYAN.—I object to all evidence tending to show the character of the plaintiff's services in Tokyo, that fact having already been determined upon the pleadings.

The COURT.—Ruling reserved. The evidence will not be considered if it appears that you are entitled to judgment on the pleadings.

Tenth Exception.

To which ruling of the court the defendant then and there excepted. [287]

Q. By endorsement, just explain what you mean. Do you mean you had to sign these accounts as correct?

A. I had to O. K. those incorrect statements.

Q. After you had O. K'd the statements were they sent to the head office in New York?

A. Yes, sir, and I didn't want to be identified with statements that were not absolutely correct and I declined to put my signature to them.

Q. When incidents like that occurred, did you refer them to Mr. Blake?

A. Yes, sir, on more than one occasion the differences which came up between the building department and my department.

Q. At any time while you were employed there

did Mr. Blake, either directly or indirectly, criticise you?

A. Not a word of criticism as long as I was there, until April 30th.

Q. And the 30th of April was more than a month after you were dismissed?

A. Yes, after I wrote him a letter.

Q. And during the course of your employment there did you make recommendations which, in your judgment, would tend to improve the system of accounts? A. I certainly did.

Q. Did you submit those to Mr. Blake?

A. Yes, sir, in the form of a letter.

Q. Did Mr. Blake adopt them? A. No, sir.

Q. When you submitted those matters which you [288] regarded would improve the system did Mr. Blake take exception to your submitting them?

A. No, indeed, he expressed his approval of my recommendations but said—

Q. At any time from the time you entered the employ of the Tokyo office of the American Trading Company up to the date you were dismissed—

A. Do you mean March 19th or April—

Q. When you actually got notice that your services were no longer required, had Mr. Blake or any other person in authority in the Tokyo office, informed you that your services were not satisfactory? Between the time you started work at the Tokyo office and the time you received notice that your services were no longer required?

A. Not a word from anybody to that effect.

Q. Did Mr. Blake, or any man in charge of the

Tokyo office, of the American Trading Company, inform you that they considered your conduct in-subordinate there?

A. No, sir, not a word to that effect.

Q. Did anyone in authority in that office, anyone superior to you, ever criticise you or tell you you were not keeping proper office hours?

A. No. On one or two occasions Mr. Blake saw me in the hall leading to my office and he had already come in, I think it was about a quarter of an hour or twenty minutes to nine, and he said, "Well, you are late" and I said, "Yes, but it was on the Company's business."

Q. Now as a matter of fact during the period you served there did you serve the full extent of [289] the office period?

A. More than that. I didn't go to tiffin during the lunch hour of twelve to two. I was the only person in the office during the lunch period.

Q. About how long is that period?

A. From twelve to two. And during an illness I attended.

Q. You were ill?

A. Yes. Against the Doctor's advice, during the flu scare there. He advised me to stay at home and I even attended the office during my illness trying to do my duty by the Company.

Q. When was the first time it was ever brought to your attention that Mr. Blake or anyone else in authority over you, were dissatisfied with your services?

A. The point of dissatisfaction was never men-

tioned to me by Mr. Blake.

Q. Never mentioned?

A. Never. Not by anybody in the office.

Q. When was the first time that any claim that you had been insubordinate mentioned to you?

A. When I read Mr. Manley's affidavit was the first time.

Q. When you read it in this court?

A. Yes, sir, the first time that I heard something about that.

Q. Now when was the first time that you were informed you were considered a disturber of the discipline of the office?

A. When I read those affidavits. Nobody ever told me that while I was there in Tokyo. [290]

Q. Now when you were dismissed by Mr. Blake were you ever informed that your services would not be required in Shanghai because of inefficiency or—

A. No, sir, neither verbally nor in writing did he ever say so.

Q. What was the reason?

A. The reason was that Mr. Burns had made arrangements with Mr. Manley to continue in the employ of the Company and as I was to replace Mr. Manley there was no need for me to go to Shanghai as I was not needed here.

Q. When was the first time you had any friction with Mr. Blake?

A. The first time was on the 30th of April.

Q. And you were dismissed on the 19th of March?

A. Yes, sir.

Q. And what gave rise to that friction?

A. I brought a Cashier order with me for one thousand yen.

Q. You presented it to Mr. Blake?

A. I presented it to Mr. Blake because the manager of the Tokyo office declined to O. K. it without Mr. Blake's endorsement.

A. I had received a letter from Mr. Ward, or a cablegram from Mr. Ward to the effect that I was to await advice in Tokyo and that was the understanding, you see.

Q. At the time you presented this order?

A. I wanted to await advices from Mr. Ward in Shanghai instead of Tokyo as they didn't want me there.

Q. You mean by that that you presented this order [291] for funds to proceed to Shanghai?

A. Yes, and to wait there. I wanted about a month's salary. I figured about a thousand yen, and await advice from Mr. Ward, in regard to the balance of my contract.

Q. And that is the first time, you say, any friction occurred?

A. Yes, and he got annoyed.

Mr. BRYAN.—I renew my previous exception.

Noted.

10th.

That the said court erred in overruling the objections of counsel for plaintiff in error to the following testimony of the witness, A. T. Steele: (Bill of Exceptions 44-46).

Q. Sometime subsequent to your dismissal by

Mr. Blake, you entered into negotiations with Mr. Blake to arbitrate your differences about this matter? A. Yes, sir.

Q. Now, how were those negotiations conducted? Verbally or in writing?

Mr. BRYAN.—I object on the ground that the agreement to arbitrate by the parties, as set forth and admitted in the pleadings, cannot be changed by extraneous evidence.

The COURT.—Objection overruled.

Eleventh Exception.

To which ruling of the court the defendant then and there excepted.

Q. Now, Mr. Steele, when negotiations were arranged for this arbitration were they conducted between you and Mr. Blake by correspondence? [292]

A. Yes, sir.

Q. (Handing witness Plaintiff's Exhibit F) Now Mr. Steele, take a look at that and tell us what it is?

A. This is a copy of a letter that I wrote to Mr. Blake, the Vice president and General Manager of the American Trading Company.

Q. This is a copy of a letter you wrote to Mr. Blake?

A. Yes, embodying the understanding between Mr. Blake and I that—

Q. This is a press copy of your own hand writing?

A. Yes, sir.

Q. I will read this letter.

Mr. BRYAN.—I object on the ground that this letter is not admissible in evidence because the agreement to arbitrate, as set forth and admitted in the

pleadings, cannot be changed by extraneous evidence.

The COURT.—Objection overruled.

Twelfth Exception.

To which ruling of the court the defendant then and there excepted.

Q. This is a letter you sent dated May 2d, 1919, addressed to Mr. Ward (Read letter.)

Handing witness Plaintiff's Exhibit "G."

Q. And what is this?

A. This is Mr. Blake's reply to my letter confirming the subject matter to be arbitrated.

Q. You are familiar with Mr. Blake's signature?

A. Yes, sir. He signed it as Vice President of the Company. [293]

Mr. BRYAN.—I object on the ground that this letter is not admissible in evidence on account of the fact that the agreement to arbitrate as set forth and admitted in the pleadings cannot be changed by extraneous evidence.

The COURT.—Objection overruled.

Thirteenth Exception.

To which ruling of the court the defendant then and there excepted.

Q. Now Mr. Steele, after the exchange of these letters were these letters submitted to the arbitrator, Mr. Potter?

A. Yes, sometime later.

11th.

That said court erred in permitting plaintiff's counsel to read a letter, known as Plaintiff's Exhibit "F," over defendant's objection, the same

never having been offered nor received as evidence by the court, and in considering said letter, known as Plaintiff's Exhibit "F," as evidence. Exhibit "F" is as follows:

Plaintiff's Exhibit "F."

May 2d, 1919.

Mr. D. H. Blake,
Vice President & General Manager,
American Trading Co.,
Present.

Dear Sir:

With further reference to the matter of giving up my office and handing over charge of my department to Mr. Boyd, which you wish me to do immediately notwithstanding the fact that I am entitled to a month's written notice to that effect, under the Japanese law which you threaten to invoke, to compel me to do so, I am perfectly willing to hand over the keys of the safe, to Mr. Boyd, after I have duly accounted for the notes, securities, etc., which are in that safe, if it be distinctly understood between us in writing that in my doing so my rights and interests under my original agreement with the company made with Mr. Ward, and ratified by Mr. Burns, and later confirmed by you in [294] your letter of appointment dated August 27, 1918, are not in any way prejudiced thereby.

It must also be distinctly understood between us in writing in accordance with the terms of my understanding with our Ambassador, the Hon. Mr. Roland Morris, reached in my conversation with him at the Embassy yesterday, that we are both to agree and to

state such an agreement in writing to him, assenting to the arbitration of the Hon. Mr. Potter, whose award must be considered as binding to both parties in the matter of the main issue involved in the case, viz., the amount of compensation to be paid to me here at the Tokyo office of the Company in full settlement of all my claims against the Company under the the agreements I have with the Company.

Kindly confirm this understanding and oblige,
(Sgd.) A. T. STEELE.
12th.

That said court erred in considering defendant in error's exhibit "G" as part of the evidence, said exhibit never having been offered nor received as evidence. Said Exhibit "G" is as follows:

Plaintiff's Exhibit G.

Tokyo, May 2, 1919.

A. T. Steele,
Tokyo.

Dear Sir:

I am in receipt of your letter of even date, and in reply thereto would state that in giving up your duties and handing over charge of the Accountant Department to Mr. Boyd, as requested by me, both verbally and in writing, your rights and interests under your original agreement with the Company, or my letter of August 27th, 1918 will not be prejudiced in any way.

With reference to the Arbitration of our differences, I confirm my previously expressed willingness to acquiesce in the suggestion made by H. E. Ambassador Morris, that the Arbitration should be

placed in the hands of the Honorable Mr. Potter, who is at present in Tokyo, and that his award should be binding on both parties, and shall be settled in Tokyo.

I remain,

Yours very truly,

AMERICAN TRADING COMPANY,

D. H. BLAKE,

Vice President. [295]

13th.

That the said court erred in overruling the motion made by counsel for plaintiff in error at the conclusion of the evidence for the taking of the depositions on commission of Mr. Mauger and Mr. Moss, regarding the system of doing business at the Tokyo office, upon the following grounds:

First. That the defendant was taken by surprise at the testimony of the witness, A. T. Steele, when he testified as to the irregularities committed by the said Mr. Mauger and Mr. Moss.

Second. That said defendant was unable to produce any evidence to refute the testimony of the witness, A. T. Steele without the taking of said depositions.

Third. That the court, by overruling said motion, unduly prejudiced the case of the plaintiff in error.

14th.

That said court erred in not holding in its written decision filed at Shanghai on April 20, 1920, that the letter of August 27, 1918 (Plaintiff's Exhibit "C") was a supplemental contract to the contract dated May 18, 1918 (Plaintiff's Exhibit "A")

containing all the terms and conditions of said contract of May 18, 1919 (Plaintiff's Exhibit "A").

15th.

That the said court erred in not holding in its written decision filed at Shanghai on April 20th, 1920, that the satisfactory service clause of the contract dated May 18, 1918 (Plaintiff's Exhibit "A") i. e. "Satisfactory service. The undertaking herein contained on our part are all conditioned upon your doing your work in a satisfactory manner," was a part and parcel of said contract of August 27, 1918 (Plaintiff's Exhibit "C"). [296]

16th.

That the said court erred in not holding in its written decision filed at Shanghai on April 20, 1920, that the contract of May 18, 1918 (Plaintiff's Exhibit "A") was void and of no effect, having been abrogated by the contract of August 27, 1918 (Plaintiff's Exhibit "C").

17th.

That the said court erred in not holding in its written decision filed at Shanghai, on April 20, 1920, that "it could not inquire into the reasonableness of defendant's dissatisfaction."

18th.

That the said court erred in holding in its written decision filed at Shanghai on April 20, 1920 that "it could inquire and decide whether or not the discharge was really because of the way plaintiff did his work or on some other grounds."

19th.

That the said court erred in not holding in its writ-

ten decision filed at Shanghai on April 20, 1920 that the burden of proving whether or not the master acted in good faith in discharging the servant was upon the plaintiff.

20th.

That said court erred in not finding the following exhibit and testimony to be conclusive and binding upon it as to the unsatisfactoriness of the defendant in error's services rendered under the contract alleged in plaintiff's petition (Exhibit "A") and the letter of August 27, 1918 (Exhibit "C"). Said exhibit and testimony are as follows:

May 10th, 1919.

Honorable William Potter,
c/o American Embassy,
Tokyo.

Dear Sir:

We acknowledge your letter of the 2d instant [297] and wish to express our appreciation of your willingness to arbitrate the differences which have arisen between our Company and Mr. A. T. Steele. We further desire to record our appreciation of the good offices of his Excellency Ambassador Morris, which have resulted in your undertaking this task.

In the beginning we wish to explain that it has never been our intention to evade our responsibilities or disregard Mr. Steele's rights under his contract.

The correspondence submitted will show you that Mr. Steele was originally employed on behalf of our Shanghai office, but later on he was held at Tokyo

to assume, temporarily, the duties of Mr. Boyd, while the latter took a short holiday.

In the meantime it developed that Mr. Steele's services were not required at Shanghai, and we at once began negotiating with him for the cancellation of his contract. In view of the fact that he had been originally employed by Mr. Ward in San Francisco, who was a personal friend of his, we recommended that the matter should be referred to him for settlement, and we had every reason to believe that this arrangement would be entirely satisfactory.

You will note that we gave Mr. Steele written notice that his services with this office would terminate on Mr. Boyd's return to Tokyo. He took no exception to this arrangement at the time, and in fact as late as April 29th, he told the writer and Mr. Mauger, the agent of the Tokyo office, that he would turn over his duties to Mr. Boyd the following day. This however he failed to do notwithstanding our repeated requests. Owing to his arbitrary and unwarranted actions our business was seriously interfered with for several days.

As an instance of the inconvenience we were subjected to we would say that our accountant's safe remained closed for two days, during which time we were deprived of the use of our securities and other important documents.

During this time we had agreed to Mr. Steele's demand for an arbitration so we contend that there was no ground for his arbitrary and illegal action.

We might point out that Mr. Steele's rights under his contract would have been just as secure without

this "hold up" and we feel sure you will agree with this statement.

We would finally put on record that it was not until the 8th inst. that Mr. Steele handed over the last of our keys which were in his possession.

We now come to the character of Mr. Steele's work while he was in this office. He adopted the attitude from the start that our system of bookkeeping was all wrong, and this of course led to more or less friction and unpleasantness.

During the first few months of his stay here his attendance on the office was so irregular as to cause great hindrance to our business. It very frequently happened that he did not turn up at the office until 9:30 o'clock, sometimes 10 o'clock, or even later—this in spite of the fact that a notice is posted that our office hours are from 9 o'clock.

If required we can offer numerous witnesses to prove the correctness of the above statements. [298]

On three occasions the writer called Mr. Steele to task for his disregard of our office rules, and during one of these interviews we told him that if he found it imposible to comply with our regulations he had better return to San Francisco. Notwithstanding our repeated admonitions he still persisted in ignoring the office rules, and we submit that on this point alone we could have found sufficient justification for cancelling his contract.

We now wish to discuss Mr. Steele's unauthorized correspondence on affairs pertaining to our office.

We enclose copies of his letters of April 17th and

April 24th addressed to Mr. L. A. Ward of San Francisco.

These copies are certified to us by Miss Paul who was our stenographer at the time they were written, but who has since left our employ. She is, however, still in Yokohama and would be willing to answer any questions if called upon to do so.

Mr. Steele told the writer that he had addressed certain letters to Mr. Ward, but never mentioned their character; he also intimated that he had taken an extra copy for our files, but at the same time never offered to hand them over.

We now have every reason to believe that his apparent willingness that we should see this correspondence was pure camouflage as it must be apparent to anyone that had we seen the letter of April 24th, it would never have left our office.

Since the beginning of this month we have repeatedly asked Mr. Steele, both verbally and in writing (see copy of our letter of May 6th) for copies of his correspondence with Mr. Ward, but up to this writing he has failed to comply.

We might explain that the addressee of these letters is the Vice President and General Manager of the American Trading Company (Pacific Coast), a Company with which we are associated, but which is a separate and distinct organization.

Mr. Ward has no jurisdiction over this office and is not even an employee of the American Trading Company proper.

We do not even intimate that Mr. Ward was a party to this clandestine correspondence and we even

believe that he will disavow any connection with it.

We do not know how many more letters were written or the nature of their contents, but the opening paragraph of the letter of April 17th furnishes proof that there were others. This paragraph also shows that Mr. Steele was keeping Mr. Ward advised of "developments."

We would also like to call your attention to the first paragraph of the letter of April 24th in support of our statement that we thought Mr. Steele was agreeable to handing over his duties to Mr. Boyd on the latter's return.

We do not undertake to deal in detail with the balance of the subject-matter of this letter, but we might remark that against Mr. Steele eight months service in the Company the men who he subjects to such severe criticisms and innuendoes have the following records:—

Mr. Blake, 23 years, Mr. Mauer, 20 years, Mr. Boyd, 17 years and Mr. Moss 9 years. [299]

We would further mention that Mr. Mauger previous to coming to Tokyo, was the chief accountant of our company in New York for a number of years, and is, presumably, as capable a man on books as Mr. Steele, and also has the welfare of the Company quite as much at heart.

We submit that Mr. Steele in carrying on such correspondence was practicing both deception and treachery, and on either count he had committed an unpardonable offense.

If he acted with a realization of what he was doing then certainly he has no excuse to offer, but on the

other hand if he pleads ignorance, he convicts himself of being deficient in the most elementary principals of business.

It seems incredible that any man endowed with ordinary intelligence could *do* abuse the confidence of his employers as Mr. Steele has done in carrying on this correspondence.

We would respectfully submit for your consideration the following points:—

1. Would Mr. Steele have been justified in writing such a letter as that of April 24th, even to the head office of the Company, without the knowledge and consent of his superior officer?

2. Assuming for arguments sake that your answer to the above is in the affirmative, would he have been justified in sending the same letter to a man who had no connection whatever with the office which employed him?

3. Having committed this office has he not proven himself irresponsible and untrustworthy?

4. In view of all the other facts would we not have had good and sufficient grounds for dismissing him from our office?

In conclusion we have to say that under ordinary circumstances we would have had no other thought than to treat Mr. Steele liberally, but in view of the unsatisfactory character of his work and the treachery he has displayed toward his office and employers, we now prefer that the case be settled entirely on its merits.

Respectfully submitting the above, and with re-

newed thanks for your kind assistance, we remain,

Yours very truly,

Page 24 Bill of Exceptions.

Q. Now you stated that you objected to Mr Steele's coming out here.

A. I objected, to Mr. Ward, after meeting him.

Q. For what reason?

A. On account of his personality. [300]

Pages 26 to 32 Bill of Exceptions.

Q. Now when you first saw Mr. Steele did you approve of him? A. No.

Q. Why didn't you approve of him?

A. As I stated to Mr. Ward after my conversation with Mr. Steele that I thought a mistake had been made, as Mr. Ward told me that Mr. Steele was born of Indian and American parentage in India, and that whatever our feelings might be in the matter, that there was strong prejudice against Eurasians in China and that as chief accountant in our office he would find it very difficult to deal with these objections in China.

Q. You were merely considering the unfortunate position that people like him were placed in Shanghai?

A. Yes.

Q. You had no prejudice against him personally?

A. None whatsoever at that time.

Q. It is a fact, isn't it, that in Shanghai people in a position like that Mr. Steele was to occupy, would have to consult with Managers of the Banks and with other Managers of other companies?

A. Yes, especially the managers of Banks.

Q. And where a man has to do a thing of that sort he has to be a man that has some social standing in that community? [301]

Q. Did you have any conversation with Mr. Blake relative to the manner in which Mr. Steele rendered his services in Tokyo? A. Yes.

Q. State to the Court in substance what those conversation were.

Mr. FESSENDEN.—I object on the ground that the evidence is hearsay.

The COURT.—This evidence is admissible under the order of January 14th, 1920. Objection overruled.

Q. Will you state the substance of your conversation with Mr. Blake regarding the services rendered by Mr. Steele at the Tokyo office?

A. When I arrived at Yokohama on my way back to Shanghai after a furlough, Mr. Blake spoke to me about Mr. Steele and said his services had been most unsatisfactory. That he had been very dilatory, came to the office at 9:30, 10:00, etc., and when Mr. Blake spoke to him, told him, if he didn't mend his ways he had better go back to San Francisco. Said he was a great disturber in the office, that he objected to methods laid down by his superiors, that he had taken on writing for the newspapers and had written articles which, if traced back to an employee of the American Trading Company might injure its business, and that all in all he would be a most unsatisfactory man for me to accept for Shanghai, and I told him that under these circumstances that I wish that he would make an arrangement with Mr.

Steele to cancel any arrangements that might have been made to [302] come to Shanghai, and that if there was any expense attached thereto that while I didn't consider it my business, the Shanghai office would most willingly stand it rather than have Mr. Steele come on to the Shanghai office.

Q. And the reasons you have stated for not wanting Mr. Steele were brought about on account of what Mr. Blake told you? A. Yes.

Q. And did you receive any correspondence or any letters from Mr. Blake regarding the unsatisfactoriness or inefficiency rendered by Mr. Steele?

A. I did eventually receive a letter from Mr. Blake enclosing all correspondence with Mr. Steele and the arbitrator's ward and the decision of the arbitrator regarding this matter.

(Defendant's exhibit 1 accepted in evidence).

(Handing witness Defendant's Exhibit 2.) Accepted as evidence.

Q. What is this letter?

A. An enclosure received from Mr. Blake in a letter which has been submitted to the Court, being Mr. Blake's brief to Mr. Potter in the arbitration arranged between Mr. Steele and the American Trading Company of Tokyo.

Q. Did you write to Mr. Blake and ask him for the documents and papers in the Steele matter?

A. I did.

Q. And as a result of that letter you received a letter dated June 10th, 1919.

A. Yes.

Q. And in that letter this was enclosed?

A. Yes. He stated in that letter that he was [303] Handing me all of these papers covering the entire case and awaiting the decision of the arbitrator, which he sent with it.

Q. What is this, Mr. Burns?

A. A letter from Mr. Steele to Mr. Blake, dated March 19, Tokyo.

Handing witness Defendant's Exhibit No. 4.

Q. What is that, Mr. Burns?

A. The decision of Mr. Potter, the arbitrator, in the case of Steele vs. Blake.

Q. Was that enclosed in the letter of June 10th?

A. Yes, it is specifically mentioned in that letter.

Q. Did you write to Mr. Blake asking for the papers in the Steele matter? A. Yes.

Q. And as a result of that letter you received a letter of June 10th, enclosing—including enclosures, one of which is this? A. Yes.

Q. (Handing witness Defendant's Exhibit No. 5). What is this, Mr. Burns?

A. A letter written by Steele to Ward.

Q. Was that included in the letter of June 10th?

A. Yes.

Q. The letter of June 10th was an answer to a letter that you wrote requesting Mr. Blake to send you all the papers in the Steele matter? [304]

A. Yes.

Q. And this was enclosed in that letter?

A. Yes.

(Handing witness Defendant's Exhibit No. 6).

Q. What is this, Mr. Burns?

A. Another letter written by Steele to Ward, dated April 17.

Q. Was that enclosed in the letter of June 10th?

A. Yes.

Q. And the letter of June 10th was in answer to a request for all papers in the Steele matter?

A. Yes.

Q. And this was enclosed in the letter of June 10th? A. Yes.

(Handing witness Defendant's Exhibit No. 7.)

Q. What is this, Mr. Burns?

A. A letter from Mr. Steele dated March 19th.

Q. (Handing witness Defendant's Exhibit No. 8.)

What is this, Mr. Burns?

A. A letter from Mr. Blake to Mr. Steele dated May 6th.

Q. Was this enclosed in the letter of June 10th?

A. It was.

Q. (Handing witness Defendant's Exhibit No. 9.)

What is this, Mr. Burns?

A. Letter from Mr. Blake to Mr. Steele, dated March 19th.

Q. Was that enclosed in the letter of June 10th?

A. Yes.

Q. (Handing witness Defendant's Exhibit No. 10.)

Now, what is this, Mr. Burns?

A. Letter of Mr. Blake addressed to Mr. Ward, San Francisco, dated March 19th. [305]

Q. This was enclosed in the letter of June 10th?

A. Yes.

Defendant's Exhibits 1 to 10, inclusive, offered in evidence.

Mr. FESSENDEN.—I object to the admission of Defendant's Exhibits Nos. 2, 5, 6, 8, 3 and 10 on the ground that they are inadmissible under the order of January 14th, 1920.

The COURT.—Ruling reserved.

Seventh Exception.

To which ruling of the Court the defendant then and there excepted.

Q. Mr. Burns, where are,—as far as you know, where are the original letters of which the one is enclosed in the letter of June 10th, are copied?

A. In the case of the papers relating to the arbitration, they are in the hands of Mr. Potter, the arbitrator, who has left Tokyo and has gone to Philadelphia, and Mr. Blake, who has gone to London to take charge of our London office.

Q. Have you endeavored to get a certified copy of these?

A. Yes, we tried to get it from the Minister at Tokyo and he said it should be obtained from Mr. Potter and we have cabled to America to try to get copies of all the papers in the arbitration.

Q. You have used every effort to try to get the original papers or certified copies? A. Yes.

Q. And up to the present you have not been able to get them?

A. They have not come as yet, I telegraphed Mr. [306] Blake at San Francisco, and at New York. The Tokyo office have. It is out of my jurisdiction completely.

Q. Mr. Blake is the only one who had any direct knowledge of this matter? The only one in authority?

A. The matter was entirely in his hands as general manager of the Company for the Far East.

Q. Has Mr. Steele ever come to the office in Shanghai and offered to enter into employment of the—

A. Never.

21st.

That the said Court erred in not holding in its written decision filed at Shanghai on April 20th, 1920, that the personality of the plaintiff was a ground for dismissal.

22d.

That said Court erred in finding that the contract alleged in defendant in error's petition (Exhibit "A") was wrongfully terminated by the plaintiff in error.

23d.

That the said Court erred in holding in its written decision filed at Shanghai on April 20th, 1920, that the following award was void and contrary to law:

Defendant's Exhibit No. 4.

Arbitration of case A. Tilton Steele vs. D. H. Blake, Vice President, American Trading Co. Tokyo, Japan.

Mr. A. Tilton Steele has a contract with the American Trading Co. (Pacific Coast) a company which Mr. D. H. Blake states is an associated but with a separate and distinct organization from his American Trading Co. in Tokyo. The American

Trading Co. (Pacific Coast) signed by Lewis A. Ward, Vice President and Manager makes a three year contract from July [307] 1st, 1918, with Mr. Steele as chief accountant at their Shanghai office including transportation thereto. On his way to Shanghai Mr. Steele was stopped at Yokohama by wireless from Mr. Blake and requested to assume temporarily the duties of a Mr. Boyd of the Tokyo office while the latter was away on holiday. In the meantime it is developed that Mr. Steele's services were not needed at Shanghai and Mr. Blake states in writing that he began to negotiate with Mr. Steele for a cancellation of his contract and recommends to Mr. Steele that the matter should be referred to Mr. Lewis A. Ward, vice-president and manager of the American Trading Co. (Pacific Coast) who had made the contract hereinbefore mentioned. Mr. Blake also writes that he never had any intention to disregard Mr. Steele's rights under this contract. In Mr. Blake's letter dated March 19th, 1919, he writes in part as follows: "We have received word from Mr. Burns, agent of Shanghai office that as he has made satisfactory arrangements with Mr. Manley (the chief accountant whose position under the contract Mr. Steele was to take) to remain with the Company, he Mr. Burns did not now wish Mr. Steele to come to Shanghai. We also confirm our statement that as soon as Mr. Boyd returns to his position in Tokyo, probably about the end of April we have no further use for your services here, we cannot say what your recourse will be under your contract, but

as intimated the other day the writer will be glad to render you such assistance as he can in order to effect a mutual satisfactory settlement—but before anything can be done in this connection it will be necessary for you to make some suggestions in the premises.”

Mr. Blake's next letter is May 6th, in which he demands the return of a number of keys which he claims belong to the company and notifies Mr. Steele that he has a debit balance of Yen 541.21 which he asks payment of at once to Mr. Blake. Mr. Blake's letter to Mr. Steele dated August 27th, 1918, employs him temporarily in Tokyo for practically the same salary as his contract, said temporary employment to be for such time as Mr. Boyd is absent on holiday, which Mr. Blake estimates will be about six months. Mr. Blake further adds in this letter this time will of course apply to Mr. Steele's three years' term as mentioned in original contract. Mr. Blake concludes this letter as follows: “It is understood between us that this temporary arrangement does not prejudice any verbal understanding which you (Mr. Steele) may have had with Mr. Ward or with Mr. Burns prior to your departure from San Francisco.

Mr. Steele also claims that he had a verbal understanding in San Francisco with Mr. Burns of the Shanghai office, that his passage back to San Francisco including all legitimate traveling expenses were to be paid by the Company and that both Mr. Ward and Mr. Burns stated to

him (Mr. Steele) that this was the custom of the company in all cases of covenanted servants and that Mr. Steele would of course be treated in the same way.

After reading over carefully the briefs which have been submitted by both Mr. Blake and Mr. Steele [308] I am of the opinion that the matter of the three year contract should be referred to Mr. Ward in San Francisco for settlement.

Second: That Mr. Blake should pay Mr. Steele in full until such time as Mr. Steele can secure first class passage back to San Francisco less any indebtedness that may be proved that Mr. Steele owes Mr. Blake.

Hoping that this conclusion may be mutually satisfactory, I am, gentlemen,

Yours very sincerely,

(Signed)

P. S. Mr. Steele's passage to San Francisco to be paid by Mr. Blake's Corp.

To Mr. D. H. Blake,

Vice-president American Trading Co.,

Tokyo, Japan.

24th.

That the said Court erred in holding in its written decision filed at Shanghai on April 20th, 1920, that the plaintiff was entitled to recover as damages the unpaid balance of his guaranteed compensation, to wit: the sum of Seven Thousand Five Hundred Dollars (\$7,500.00).

25th.

That the said Court in its written decision filed at Shanghai on April 20th, 1920, erred in not deducting from the amount of plaintiff's judgment item 10 of Plaintiff's Exhibit B, which said exhibit is attached to plaintiff's petition, which said item reads as follows: "Item 10" By balance at debit on current account of self as on May 1, 1919, as per statement rendered.

(Exhibit Q1):— Mex. \$507. Yen 545.21."
26th.

That the said Court erred in not ruling upon plaintiff in error's amended plea in abatement filed at Shanghai, China, November 28, 1919, by counsel for plaintiff in error, before the trial of said cause.
[309]

27th.

That said Court erred in not ruling upon plaintiff in error's amended motion filed at Shanghai, China, on January 9th, 1920, which motion was for the taking of the depositions of Mr. Potter, Mr. Ward and Mr. Blake.

28th.

That said Court erred in overruling plaintiff in error's motion filed at Shanghai, China, on January 13, 1920, to take the deposition on commission of D. H. Blake by an order filed at Shanghai, China, on January 14, 1920, for the following reasons:

1st. That on account of such motion being overruled, the plaintiff in error was barred from call-

ing any direct evidence as to the satisfactory services of the defendant in error.

2d. That the allegations contained in the affidavit in support of said motion were not admitted by the defendant in error, and the letters (Plaintiff in Error's Exhibits 2, 5, 6, 8, 3 and 10) were not construed by the Court as evidence worthy of consideration.

29th.

That the said Court erred in not entering judgment in favor of the plaintiff in error and against the defendant in error.

WHEREFORE defendant prays that said judgment be reversed and that the defendant be allowed to depart hence and recover its costs.

HEMING, DAVIES & BRYAN,

Attorneys for Defendant.

Filed at Shanghai, China, Aug. 27, 1920. James P. Connolly, Clerk. [310]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE,

Plaintiff,

vs.

AMERICAN TRADING CO.,

Defendant.

Bond on Writ of Error.

Know All Men by These Presents: That we, the American Trading Co., as principals, and the Asia Banking Corporation, as surety, are held firmly bound unto A. T. Steele in the full and just sum of seven thousand five hundred dollars (\$7,500.00) United States Gold coin, minus the sum of fifty dollars (\$50.00) Mexican currency, to be paid to the said A. T. Steele, his certain attorneys, successors or assigns; to which payment well and truly to be made we bind ourselves and our successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of April, 1920.

WHEREAS lately in the United States Court for China in a suit pending in said court between A. T. Steele as plaintiff and the American Trading Co., as defendant, a judgment was rendered against the said American Trading Co. and the said American Trading Co., having obtained by order of court one month from the date of judgment, to wit, one month from April 20, 1920, in which to file a bill of exceptions to said judgment, a copy of which together with a petition for a writ of error will be filed in the clerk's office of said court on or before the 20th [311] day of April, 1920. Now, the condition of the above obligation is such that if the said American Trading Co. shall prosecute said writ of error which is to be obtained to effect and answer all damages and costs, if it fails to make the said plea good, then the above

obligation shall be void, otherwise to remain in full force and virtue.

AMERICAN TRADING CO.,
(Sgd.) W. A. BURNS,
ASIA BANKING CORP.,
(Sgd.) By E. McQUADE.

Approved:

(Sgd.) CHARLES S. LOBINGIER,
Judge.

Filed at Shanghai, China, April 26, 1920 James
P. Connolly, Clerk. [312]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE,

Plaintiff,

vs.

AMERICAN TRADING CO.,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, pursuant to the writ of error allowed in the above-entitled cause and to include in such transcript of record the following and no other papers or exhibits, to wit:

Complaint. Filed July 3, 1919.

Plea in Abatement. Filed July 22, 1919.

Amended Plea in Abatement. Filed Nov. 28, 1919.

Motion and Affidavit for permission to take depositions on commission. Filed Dec. 19, 1919.

Affidavit by J. B. Manley. Filed January 8, 1920.

Amended Motion for permission to take Depositions on commission. Filed Jan. 9, 1920.

Order allowing defendant to file amended answer. Filed Jan. 9, 1920.

Affidavit by W. A. Burns. Filed Jan. 13, 1920.

Motion for taking of Depositions on Commission. Filed January 13, 1920.

Order overruling motion to take Depositions on Commission. Filed Jan. 14, 1920.

Amended Answer filed on January 16, 1920.

Replication filed on January 21, 1920.

Defendant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.

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Plaintiff's Exhibits A, B, C, D, E, F, G, H.

Decision filed April 20, 1920.

Notice of Appeal. Filed April 21, 1920.

Bond on Writ of Error. Filed April 26, 1920.

Motion for further time in which to affect its appeal. Filed May 22, 1920.

Order extending time to file bill of exceptions.

Petition for Writ of Error.

Bill of Exceptions. Filed Aug. 27, 1920.

Defendant's Assignment of Errors. Filed Aug. 27, 1920.

Writ of Error.

Citation on Writ of Error and Service of Same.

Order Allowing Writ of Error.

Praeceptum for Transcript.

Order extending time to file Record in Circuit Court of Appeals.

And file said transcript with the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

HEMING, DAVIES & BRYAN,
Attorneys for Defendant.

Filed at Shanghai, China, Aug. 27, 1920. James P. Connolly, Clerk. [314]

In the United States Court for China.

Cause No. 798.

Civil No. 272.

A. T. STEELE,

Plaintiff,

vs.

AMERICAN TRADING CO.,

Defendant.

Writ of Error.

THE UNITED STATES OF AMERICA,—ss.

The President of the United States of America: To the Honorable Judge of the United States Court for China, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in

the said United States Court for China, before you, between A. T. Steele, plaintiff, and the American Trading Co., defendant, a manifest error hath happened, to the great damage of the said American Trading Co., defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do commend you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at San Francisco, in said Circuit, on the 15th day of October next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct [315] that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 14 day of August, 1920.

CHARLES L. LOBINGIER,

Judge of the United States Court for China.

Attested: JAMES P. CONNOLLY,

Clerk of the United States Court for China.

Filed at Shanghai, China, Aug. 27, 1920. James P. Connolly, Clerk. [316]

**Certificate of Clerk United States Court for China
to Transcript of Record.**

Cause No. 798.

Civil No. 272.

Shanghai, China,—ss.

In pursuance of the command of the writ of error within, I, James P. Connolly, Clerk of the United States Court for China, herewith transmit a true copy of the record, bill of exceptions, assignment of errors and all proceedings in this case of A. T. Steele, the Plaintiff, vs. the American Trading Co., the Defendant, lately pending in the United States Court for China, under my hand and the Seal of said Court.

Witness my official signature and the seal of said United States Court for China at the City of Shanghai, within the jurisdiction of said court this 27 day of August, 1920.

[Seal] JAMES P. CONNOLLY,

Clerk of the United States Court for China.

Filed at Shanghai, Aug. 27—1920. James P. Connolly, Clerk. [317]

In the United States Court of China.

Cause No. 798.

Civil No. 272.

A. T. STEELE,

Plaintiff,

vs.

AMERICAN TRADING CO.,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

To A. T. Steele, GREETING:

You are hereby cited and admonished to be and appear at the next session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden at the city of San Francisco, pursuant to a writ of error filed in the office of the Clerk of the United States Court for China, wherein the American Trading Co. is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable CHARLES S. LOBINGIER, Judge of the United States Court for China, this 14th day of August, 1920.

CHARLES S. LOBINGIER,

Judge of the United States Court for China.

We hereby, this 14th day of Sept., 1920, accept

due personal service of this citation on behalf of A. T. Steele, the defendant in error.

JERNIGAN, FESSENDEN & ROSE,

By STERLING FESSENDEN,

Attorneys for Defendant in Error.

Filed at Shanghai, China, Aug. 27, 1920. James P. Connolly, Clerk. [318]

[Endorsed]: No. 3585. United States Circuit Court of Appeals for the Ninth Circuit. American Trading Company, a Corporation, Plaintiff in Error, vs. A. T. Steele, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Court for China.

Filed October 7, 1920.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 3585

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN TRADING COMPANY

(a corporation),

Plaintiff in Error,

vs.

A. T. STEELE,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

FLEMING, DAVIES & BRYAN,

GARRET W. McENERNEY,

Attorneys for Plaintiff in Error.

FILED

FEB 14 1921

F. B. MONKTON,
CLERK.

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No. 3585

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN TRADING COMPANY

(a corporation),

Plaintiff in Error,

vs.

A. T. STEELE,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

This is a writ of error from the United States Court for China. The action is one for damages for alleged breach of contract. Defendant in error, who was the plaintiff in the court below, had judgment against the plaintiff in error (defendant in the court below) for the sum of \$7500. Throughout the discussion we will refer to the parties as they were ranged in the trial court.

The action grew out of the alleged breach by the defendant of a contract made in San Francisco on May 27, 1918,¹ whereby the defendant employed the

1. R. 29.

plaintiff as chief accountant for its Shanghai office for a term of three years to commence on the date when the plaintiff should leave San Francisco to assume his duties under the contract, but in all events not later than July 1, 1918. The compensation provided in the contract for the three-year term was \$10,000.00.

The contract is in the form of a letter addressed to the plaintiff and confirmed by him, and, among other things, contains a provision as follows:

*“Satisfactory Service: The undertakings herein contained on our part are all conditioned upon your doing your work in an efficient and satisfactory way.”*²

Plaintiff sailed for Shanghai on August 9, 1918,³ to take up his duties under the contract. While on his way to Shanghai, he was stopped at Yokohama by a wireless from the defendant and requested to proceed to Tokyo, there to assume temporarily the duties of chief accountant at defendant's Tokyo office during the absence of the regular accountant.⁴

On arriving at Tokyo, the plaintiff received from the defendant a letter dated August 27, 1918⁵ and approved by the plaintiff.

The letter made provision for the term of plaintiff's employment in Tokyo and his compensation, and constituted a modification of plaintiff's original contract in respect of (a) the place of employment, i. e., Tokyo

2. R. 30.

3. R. 45.

4. R. 45, 46, 125, 172.

5. R. 31.

for the time being, rather than Shanghai, and (b) plaintiff's compensation during part of the three-year term, i. e., that covered by the employment in Tokyo. The original contract remained unaltered in all other respects. With reference to the term of plaintiff's employment in Tokyo the letter of August 27th provided that it should be while the regular accountant was absent on vacation, a period estimated in the letter at about six months.⁶ The letter provided that the term of employment in Tokyo should be deemed to be a part of the three-year term covered by the original contract executed in San Francisco,⁷ and made certain monetary allowances to the plaintiff to compensate for increased inconveniences to which he might be subjected by reason of the temporary change in his location and plans.⁸

His employment incepted under the foregoing circumstances, the plaintiff continued to work at the defendant's Tokyo office until May 3, 1919.⁹ The regular accountant for whom the plaintiff was substituting returned to Tokyo on April 30, 1919,¹⁰ and on the next day the plaintiff commenced to hand over to him the management of the accountant's department, a process which was completed on May 3rd when plaintiff's connection with the office ceased;¹¹ the plaintiff had been employed in the Tokyo office a little over eight months.

6. R. 32.

7. R. 32.

8. R. 32.

9. R. 47.

10. R. 47.

11. R. 47.

Shortly before March 19, 1918, and while he was still employed in the Tokyo office, the plaintiff, for reasons that will presently appear, was informed by the defendant that his services would not be required at the defendant's Shanghai office.¹² In the meantime the defendant had arranged to retain the incumbent accountant at Shanghai, whom it had been its intention to replace by the plaintiff.¹³

Thereafter, a question arose between the plaintiff and the defendant as to the liability of the latter on the contract made in San Francisco. The plaintiff asserted that the defendant had breached said contract. Defendant took the position that plaintiff's services in the Tokyo office were not "satisfactory", that plaintiff was insubordinate and disregarded office hours and rules and that it was justified in discharging him because he had breached the condition of "satisfactory service" contained in his contract of employment.¹⁴

The parties finally agreed to submit their dispute to arbitration. The matter was submitted to arbitration and the arbitrator by his decision refused to grant to the plaintiff any relief based upon his contract made in San Francisco. The decision of the arbitrator was:

"that the matter of the three-year contract should be referred to Mr. Ward in San Francisco for settlement".¹⁵

12. R. 52.

13. R. 52, 33.

14. R. 116 et seq.

15. R. 39.

Mr. Ward referred to in the arbitrator's decision was the person representing the defendant and had negotiated the plaintiff's contract of employment.¹⁶

The plaintiff refused to abide by the decision of the arbitrator and commenced suit in the United States Court for China, alleging that the defendant had breached his contract by dismissing and discharging him without cause on March 19, 1919.

In its answer, the defendant, among other things, alleged that the services rendered by plaintiff while in its employ were neither satisfactory nor efficient as required by plaintiff's contract, and that the plaintiff in the performance of his duties under the contract was inefficient, negligent and insubordinate to his superiors.¹⁷

The plaintiff, although he filed a replication to the answer,¹⁸ made no denial of the allegations just mentioned. Thereupon the plaintiff moved for judgment on the pleadings.¹⁹ The court denied the motion, and the cause thereupon proceeded to trial, after which judgment was rendered by the court in favor of the plaintiff in the sum of \$7500.00.²⁰ From the judgment so rendered, the defendant prosecutes a writ of error to this court.

In rendering judgment for the plaintiff, the trial court held as follows:

16. R. 30.

17. R. 27.

18. R. 28.

19. R. 191.

20. R. 152, 164.

[1] The letter of August 27, 1918, constituted a contract separate and distinct from the original contract of May 27th²¹ and was not subject to the condition of "satisfactory service" contained in the latter contract,²² and the earlier contract could not be terminated because of "unsatisfactory service" under the contract of August 27th.²³

[2] The reasons given to the plaintiff at the time of, his discharge did not include any expression of dissatisfaction with his services, and the defendant was precluded from thereafter urging "unsatisfactory service" as a reason for plaintiff's discharge.²⁴

[3] The grounds of defendant's dissatisfaction with the plaintiff were unreasonable and were not such as justified the defendant in being dissatisfied with plaintiff's services.²⁵

[4] The defendant was not entitled to judgment on the pleadings for the reasons that [a] under the rules of pleading obtaining in the United States Court for China, a plaintiff is not required to reply to affirmative allegations of an answer, but said allegations are "deemed" denied,²⁶ and [b] the affirmative allegations of "unsatisfactory service" in defendant's answer were too vague and indefinite to require a reply even though the rule of pleading obtaining in the court required a replication to affirmative allegations of an answer.²⁷

21. R. 144.

22. R. 145.

23. R. 145.

24. R. 150.

25. R. 150.

26. R. 152.

27. R. 151, 152.

[5] The award of the arbitrator relied upon by the defendant was void and of no legal effect because it did not in fact decide the matters submitted to the arbitrator.²⁸

[6] The measure of plaintiff's damages was the compensation at the contract price for the *entire unexpired term of the contract* and not merely for that portion of the term which antedated the date of trial.²⁹

The propositions which we shall seek to establish follow:

1. The defendant did not breach its contract with the plaintiff, because it was authorized by the contract to dismiss him whenever in its opinion his services were unsatisfactory or whenever he ceased to do his work in an efficient and satisfactory way, of which facts the defendant was the sole judge.
2. In its answer the defendant alleged that the services rendered by the plaintiff to the defendant were neither satisfactory nor efficient, as required by the contract, and that the plaintiff in the performance of his duties under the contract was inefficient, negligent and insubordinate to his superiors. The plaintiff failed by replication to deny these allegations, thereby admitting their truth, and, as a consequence, the defendant's motion for judgment on the pleadings should have been granted.

28. R. 153-156.

29. R.. 156, 158.

3. The court erred in reserving rulings on objections to the admissibility of evidence and in failing to rule upon such objections prior to its decision.
4. The decision of the arbitrator selected by the parties, and to whom their dispute was referred, was binding upon the plaintiff, and the court erred in holding that it was not binding upon him.
5. The court erred in holding that the measure of plaintiff's damage was compensation at the contract rate for the entire unexpired term of the contract, and in not limiting plaintiff's recovery to the compensation which he would have earned under the contract up to the time of the trial.
6. The court erred in failing to deduct from the amount of the judgment the item of \$507 (Mex.) admittedly due from the plaintiff to the defendant.

Assignment of Errors.

The record contains 29 assignments of error. Some of these assignments present the same general questions of law. It is not the intention of the plaintiff in error to press or urge upon the court all of the assignments of error contained in the record, not that we concede a lack of merit in any of them, but because we believe that those which we will press and urge upon the court are sufficient to require a reversal of the judgment which is the subject of this writ of error. Accordingly, we

shall herein urge those assignments of error only which present the legal propositions above enumerated, and which in our opinion require a reversal of the judgment of the trial court. These latter assignments of error, as they appear in the record, are as follows:

Assignment Number One.

The court erred in denying the defendant's motion for judgment on the pleadings on account of the failure of the plaintiff to deny the affirmative allegations of defendant's answer in respect of the inefficient and unsatisfactory services of the plaintiff under his contract of employment and his discharge by the defendant by reason thereof.

This assignment is the subject-matter of assignment of error Number 6, and appears in the Transcript of Record at page 277.

Assignment Number Two.

The court erred in permitting the plaintiff to testify in respect of the character and efficiency of his services while in the employ of defendant, in view of the fact that no such issue remained in the case, the plaintiff having admitted that he was inefficient and that his services were unsatisfactory, by failing in his replication to deny the affirmative allegations to that effect contained in defendant's answer.

This assignment is the subject-matter of assignment of error Number 9 appearing in the Transcript of Record at page 295. The testimony so given by the plaintiff was as follows:

“Q. What was the character of the actual services which you performed for the American Trading Company in Tokyo?

Mr. BRYAN. I object to all evidence attempting to show the character of the defendant's services rendered at Tokyo, that fact having already been determined on the pleadings.

The COURT. Ruling reserved.

Eighth Exception.

To which ruling of the court the defendant then and there excepted.

Q. What is the character of the services you performed in the Tokyo office? What class of work did you do?

A. I was practically manager of the financial department. Attended to the credits and collections and I was manager of the accounting department of the American Trading Company, Tokyo, and was head of that department with a number of men under me who did the bookkeeping and handled the details of the accounts of the company, and took care of the records and everything.

Q. Did your duties as performed involve the exercise of——

Mr. BRYAN. I wish a general exception to be noted to all such evidence.

The COURT. Ruling reserved.

Q. Were your services performed in the Tokyo office, did they involve any discretion?

A. In the capacity of manager a great deal of discretion was vested in me.

Q. During the time you served there in your exercise of that discretion did you at any time have occasion to question some of the accounts of other departments which were submitted to you as chief accountant,

A. Yes, sir, I had some occasions of that nature.

Q. Now you say you did question some accounts which were submitted to you for your approval?

A. Yes, sir.

Q. What was your reason?

Mr. BRYAN. I object on the ground that this evidence is irrelevant, immaterial and prejudicial to the case of the defendant, and further that this fact has already been determined upon the pleadings.

The COURT. Objection overruled.

Ninth Exception.

To which ruling of the court the defendant then and there took exception.

Q. Why did you object to some of the accounts?

A. Because I deemed myself responsible for the accuracy of the accounts of my department and certain statements were put before me in the capacity of manager of my department for endorsement and I declined to endorse anything that was not right.

Q. (The COURT.) Put before you by whom?

A. By Mr. Moss, for example, the building department manager, was one.

Q. Any others besides Mr. Moss?

A. No, Mr. Moss, the manager of the building department was the only man whose statements I questioned and whose handling of his department I didn't want to endorse, as chief accountant.

Q. Just what do you mean, endorse?

A. He wanted to pass through our department incorrect amounts which he was not entitled to.

Mr. BRYAN. I object to all evidence tending to show the character of the plaintiff's services in Tokyo, that fact having already been determined upon the pleadings.

The COURT. Ruling reserved. The evidence will not be considered if it appears that you are entitled to judgment on the pleadings.

Tenth Exception.

To which ruling of the court the defendant then and there excepted.

Q. By endorsement, just explain what you mean. Do you mean you had to sign these accounts as correct?

A. I had to O. K. those incorrect statements.

Q. After you had O. K.'d the statements were they sent to the head office in New York?

A. Yes, sir, and I didn't want to be identified with statements that were not absolutely correct and I declined to put my signature to them.

Q. When incidents like that occurred, did you refer them to Mr. Blake?

A. Yes, sir, on more than one occasion the differences which came up between the building department and my department.

Q. At any time while you were employed there did Mr. Blake, either directly or indirectly, criticise you?

A. Not a word of criticism as long as I was there, until April 30th.

Q. And the 30th of April was more than a month after you were dismissed?

A. Yes, after I wrote him a letter.

Q. And during the course of your employment there did you make recommendations which, in your judgment, would tend to improve the system of accounts? A. I certainly did.

Q. Did you submit those to Mr. Blake?

A. Yes, sir, in the form of a letter.

Q. Did Mr. Blake adopt them? A. No, sir.

Q. When you submitted those matters which you regarded would improve the system did Mr. Blake take exception to your submitting them?

A. No, indeed, he expressed his approval of my recommendations but said——

Q. At any time from the time you entered the employ of the Tokyo office of the American Trading Company up to the date you were dismissed——

A. Do you mean March 19th or April——

Q. When you actually got notice that your services were no longer required, had Mr. Blake or any other person in authority in the Tokyo office, informed you that your services were not satisfactory? Between the time you started work at the Tokyo office and the time you received notice that your services were no longer required?

A. Not a word from anybody to that effect.

Q. Did Mr. Blake, or any man in charge of the Tokyo office, of the American Trading Company, inform you that they considered your conduct insubordinate there?

A. No, sir, not a word to that effect.

Q. Did anyone in authority in that office, anyone superior to you, ever criticise you or tell you you were not keeping proper office hours?

A. No. On one or two occasions Mr. Blake saw me in the hall leading to my office and he had already come in, I think it was about a quarter of an hour or twenty minutes to nine, and he said, 'Well, you are late' and I said, 'Yes, but it was on the Company's business'.

Q. Now as a matter of fact during the period you served there did you serve the full extent of the office period?

A. More than that. I didn't go to tiffin during the lunch hour of twelve to two. I was the only person in the office during the lunch period.

Q. About how long is that period?

A. From twelve to two. And during an illness I attended.

Q. You were ill?

A. Yes. Against the doctor's advice, during the flu scare there. He advised me to stay at home and I even attended the office during my illness trying to do my duty by the Company.

Q. When was the first time it was ever brought to your attention that Mr. Blake or anyone else in authority over you, were dissatisfied with your services?

A. The point of dissatisfaction was never mentioned to me by Mr. Blake.

Q. Never mentioned?

A. Never. Not by anybody in the office.

Q. When was the first time that any claim that you had been insubordinate mentioned to you?

A. When I read Mr. Manley's affidavit was the first time.

Q. When you read it in this court?

A. Yes, sir, the first time that I heard something about that.

Q. Now when was the first time that you were informed you were considered a disturber of the discipline of the office?

A. When I read those affidavits. Nobody ever told me that while I was there in Tokyo.

Q. Now when you were dismissed by Mr. Blake were you ever informed that your services would not be required in Shanghai because of inefficiency or——

A. No, sir, neither verbally nor in writing did he ever say so.

Q. What was the reason?

A. The reason was that Mr. Burns had made arrangements with Mr. Manley to continue in the employ of the Company and as I was to replace Mr. Manley there was no need for me to go to Shanghai as I was not needed here.

Q. When was the first time you had any friction with Mr. Blake?

A. The first time was on the 30th of April.

Q. And you were dismissed on the 19th of March?

A. Yes, sir.

Q. And what gave rise to that friction?

A. I brought a Cashier order with me for one thousand yen.

Q. You presented it to Mr. Blake?

A. I presented it to Mr. Blake because the manager of the Tokyo office declined to O. K. it without Mr. Blake's endorsement.

A. I had received a letter from Mr. Ward, or a cablegram from Mr. Ward to the effect that I was to await advice in Tokyo and that was the understanding, you see.

Q. At the time you presented this order?

A. I wanted to await advices from Mr. Ward in Shanghai instead of Tokyo as they didn't want me there.

Q. You mean by that that you presented this order for funds to proceed to Shanghai?

A. Yes, and to wait there. I wanted about a month's salary. I figured about a thousand yen, and await advice from Mr. Ward in regard to the balance of my contract.

Q. And that is the first time, you say, any friction occurred? A. Yes, and he got annoyed.

Mr. BRYAN. I renew my previous exception.

Noted."

Assignment Number Three.

The court erred in holding in its written decision that the letter of August 27, 1918 (Plaintiff's Exhibit C), was not a mere supplement to the original contract of the plaintiff executed in San Francisco on May 27, 1918 (Plaintiff's Exhibit A).

This assignment is the subject-matter of assignment of error Number 14, appearing in the Transcript of Record at page 307.

Assignment Number Four.

The court erred in holding in its written decision that the clause in the original contract dated May 27, 1918 (Plaintiff's Exhibit A), and reading as follows:

"SATISFACTORY SERVICE. The undertakings herein contained on our part are all conditioned upon your doing your work in an efficient and satisfactory way",

was not a part of the subsequent contract of August 27, 1918 (Plaintiff's Exhibit C).

This assignment is the subject-matter of assignment of error Number 15, appearing in the Transcript of Record at page 308.

Assignment Number Five.

The court erred in holding in its written decision that plaintiff's original contract of May 27, 1918 (Plaintiff's Exhibit A), was abrogated by the subsequent contract of August 27, 1918 (Plaintiff's Exhibit C), and rendered void and of no effect.

This assignment is the subject-matter of assignment of error Number 16, appearing in the Transcript of Record at page 308.

Assignment Number Six.

The court erred in holding in its written decision that it could inquire into the reasonableness of defendant's dissatisfaction with plaintiff's services and of defendant's consequent right to discharge the plaintiff on account of "unsatisfactory service".

This assignment is the subject-matter of assignment of error Number 17, appearing in the Transcript of Record at page 308.

Assignment Number Seven.

The court erred in holding in its written decision that "it could inquire and decide whether or not the discharge (of plaintiff by defendant) was really because of the way plaintiff did his work or on some other ground".

This assignment is the subject-matter of assignment of error Number 18, appearing in the Transcript of Record at page 308.

Assignment Number Eight.

The court erred in holding in its written decision that the burden of proving whether or not defendant

acted in good faith in discharging the plaintiff was upon the defendant rather than upon the plaintiff.

This assignment is the subject-matter of assignment of error Number 19, appearing in the Transcript of Record at page 308.

Assignment Number Nine.

The court erred in holding that the reasons expressed in the letter of May 10, 1919 (Plaintiff's Exhibit 2), and the testimony of William A. Burns were not conclusive and binding upon it in respect of the inefficient and unsatisfactory services rendered by the plaintiff to the defendant under the contract of employment such as justified the defendant in discharging the plaintiff.

The letter and the testimony referred to are the subject-matter of assignment of error Number 20, contained in the Transcript of Record at page 309, et seq., and are as follows:

“May 10th, 1919.

Honorable William Potter,
c/o American Embassy,
Tokyo.

Dear Sir:

We acknowledge your letter of the 2d instant and wish to express our appreciation of your willingness to arbitrate the differences which have arisen between our Company and Mr. A. T. Steele. We further desire to record our appreciation of the good offices of his Excellency Ambassador Morris, which have resulted in your undertaking this task.

In the beginning we wish to explain that it has never been our intention to evade our responsibilities or disregard Mr. Steele's rights under his contract.

The correspondence submitted will show you that Mr. Steele was originally employed on behalf of our Shanghai office, but later on he was held at Tokyo to assume, temporarily, the duties of Mr. Boyd, while the latter took a short holiday.

In the meantime it developed that Mr. Steele's services were not required at Shanghai, and we at once began negotiating with him for the cancellation of his contract. In view of the fact that he had been originally employed by Mr. Ward in San Francisco, who was a personal friend of his, we recommended that the matter should be referred to him for settlement, and we had every reason to believe that this arrangement would be entirely satisfactory.

You will note that we gave Mr. Steele written notice that his services with this office would terminate on Mr. Boyd's return to Tokyo. He took no exception to this arrangement at the time, and in fact as late as April 29th, he told the writer and Mr. Mauger, the agent of the Tokyo office, that he would turn over his duties to Mr. Boyd the following day. This however he failed to do notwithstanding our repeated requests. Owing to his arbitrary and unwarranted actions our business was seriously interfered with for several days.

As an instance of the inconvenience we were subjected to we would say that our accountant's safe remained closed for two days, during which time we were deprived of the use of our securities and other important documents.

During this time we had agreed to Mr. Steele's demand for an arbitration so we contend that there was no ground for his arbitrary and illegal action.

We might point out that Mr. Steele's rights under his contract would have been just as secure without this 'hold up' and we feel sure you will agree with this statement.

We would finally put on record that it was not until the 8th inst. that Mr. Steele handed over the last of our keys which were in his possession.

We now come to the character of Mr. Steele's work while he was in this office. He adopted the attitude from the start that our system of book-keeping was all wrong, and this of course led to more or less friction and unpleasantness.

During the first few months of his stay here his attendance on the office was so irregular as to cause great hindrance to our business. It very frequently happened that he did not turn up at the office until 9:30 o'clock, sometimes 10 o'clock, or even later—this in spite of the fact that a notice is posted that our office hours are from 9 o'clock.

If required we can offer numerous witnesses to prove the correctness of the above statements.

On three occasions the writer called Mr. Steele to task for his disregard of our office rules, and during one of these interviews we told him that if he found it impossible to comply with our regulations he had better return to San Francisco. Notwithstanding our repeated admonitions he still persisted in ignoring the office rules, and we submit that on this point alone we could have found sufficient justification for cancelling his contract.

We now wish to discuss Mr. Steele's unauthorized correspondence on affairs pertaining to our office.

We enclose copies of his letters of April 17th and April 24th addressed to Mr. L. A. Ward of San Francisco.

These copies are certified to us by Miss Paul who was our stenographer at the time they were written, but who has since left our employ. She is, however, still in Yokohama and would be willing to answer any questions if called upon to do so.

Mr. Steele told the writer that he had addressed certain letters to Mr. Ward, but never mentioned their character; he also intimated that he had taken an extra copy of our files, but at the same time never offered to hand them over.

We now have every reason to believe that his apparent willingness that we should see this correspondence was pure camouflage as it must be appar-

ent to anyone that had we seen the letter of April 24th, it would never have left our office.

Since the beginning of this month we have repeatedly asked Mr. Steele, both verbally and in writing (see copy of our letter of May 6th) for copies of his correspondence with Mr. Ward, but up to this writing he has failed to comply.

We might explain that the addressee of these letters is the Vice President and General Manager of the American Trading Company (Pacific Coast), a Company with which we are associated, but which is a separate and distinct organization.

Mr. Ward has no jurisdiction over this office and is not even an employee of the American Trading Company proper.

We do not even intimate that Mr. Ward was a party to this clandestine correspondence and we even believe that he will disavow any connection with it.

We do not know how many more letters were written or the nature of their contents, but the opening paragraph of the letter of April 17th furnishes proof that there were others. This paragraph also shows that Mr. Steele was keeping Mr. Ward advised of 'developments'.

We would also like to call your attention to the first paragraph of the letter of April 24th in support of our statement that we thought Mr. Steele was agreeable to handing over his duties to Mr. Boyd on the latter's return.

We do not undertake to deal in detail with the balance of the subject-matter of this letter, but we might remark that against Mr. Steele's eight months' service in the Company the men whom he subjects to such severe criticisms and innuendoes have the following records:

Mr. Blake, 23 years; Mr. Mauer, 20 years; Mr. Boyd, 17 years, and Mr. Moss, 9 years.

We would further mention that Mr. Mauger previous to coming to Tokyo, was the chief accountant of our company in New York for a number of years, and is presumably, as capable a man on books

as Mr. Steele, and also has the welfare of the Company quite as much at heart.

We submit that Mr. Steele in carrying on such correspondence was practicing both deception and treachery, and on either count he had committed an unpardonable offense.

If he acted with a realization of what he was doing then certainly he has no excuse to offer, but on the other hand if he pleads ignorance, he convicts himself of being deficient in the most elementary principles of business.

It seems incredible that any man endowed with ordinary intelligence could *do* abuse the confidence of his employers as Mr. Steele has done in carrying on this correspondence.

We would respectfully submit for your consideration the following points:

1. Would Mr. Steele have been justified in writing such a letter as that of April 24th, even to the head office of the Company, without the knowledge and consent of his superior officer?

2. Assuming for argument's sake that your answer to the above is in the affirmative, would he have been justified in sending the same letter to a man who had no connection whatever with the office which employed him?

3. Having committed this offense, has he not proven himself irresponsible and untrustworthy?

4. In view of all the other facts would we not have had good and sufficient grounds for dismissing him from our office?

In conclusion we have to say that under ordinary circumstances we would have had no other thought than to treat Mr. Steele liberally, but in view of the unsatisfactory character of his work and the treachery he has displayed toward his office and employers, we now prefer that the case be settled entirely on its merits.

Respectfully submitting the above, and with renewed thanks for your kind assistance, we remain,

Yours very truly,"

“Q. Now you stated that you objected to Mr. Steele’s coming out here.

A. I objected, to Mr. Ward, after meeting him.

Q. For what reason?

A. On account of his personality.

Q. Now when you first saw Mr. Steele did you approve of him? A. No.

Q. Why didn’t you approve of him?

A. As I stated to Mr. Ward after my conversation with Mr. Steele that I thought a mistake had been made, as Mr. Ward told me that Mr. Steele was born of Indian and American parentage in India, and that whatever our feelings might be in the matter, that there was strong prejudice against Eurasians in China, and that as chief accountant in our office he would find it very difficult to deal with these objections in China.

Q. You were merely considering the unfortunate position that people like him were placed in Shanghai? A. Yes.

Q. You had no prejudice against him personally?

A. None whatsoever at that time.

Q. It is a fact, isn’t it, that in Shanghai people in a position like that Mr. Steele was to occupy, would have to consult with managers of the banks and with other managers of other companies?

A. Yes, especially the managers of banks.

Q. And where a man has to do a thing of that sort he has to be a man that has some social standing in that community?

Q. Did you have any conversation with Mr. Blake relative to the manner in which Mr. Steele rendered his services in Tokyo? A. Yes.

Q. State to the Court in substance what those conversations were.

Mr. FESSENDEN. I object on the ground that the evidence is hearsay.

The COURT. This evidence is admissible under the order of January 14th, 1920. Objection overruled.

Q. Will you state the substance of your conversation with Mr. Blake regarding the services rendered by Mr. Steele at the Tokyo office?

A. When I arrived at Yokohama on my way back to Shanghai after a furlough, Mr. Blake spoke to me about Mr. Steele and said that his services had been most unsatisfactory. That he had been very dilatory, came to the office at 9:30, 10:00, etc., and when Mr. Blake spoke to him, told him, if he didn't mend his ways he had better go back to San Francisco. Said he was a great disturber in the office, that he objected to methods laid down by his superiors, that he had taken on writing for the newspapers and had written articles which, if traced back to an employee of the American Trading Company might injure its business, and that all in all he would be a most unsatisfactory man for me to accept for Shanghai, and *I told him that under these circumstances that I wish that he would make an arrangement with Mr. Steele to cancel any arrangements that might have been made to come to Shanghai, and that if there was any expense attached thereto that while I didn't consider it my business, the Shanghai office would most willingly stand it rather than have Mr. Steele come on to the Shanghai office.*

Q. And the reasons you have stated for not wanting Mr. Steele were brought about on account of what Mr. Blake told you? A. Yes.

Q. And did you receive any correspondence or any letters from Mr. Blake regarding the unsatisfactoriness or inefficiency rendered by Mr. Steele?

A. I did eventually receive a letter from Mr. Blake enclosing all correspondence with Mr. Steele and the arbitrator's ward and the decision of the arbitrator regarding this matter.

(Defendant's Exhibit 1 accepted in evidence.)

(Handing witness Defendant's Exhibit 2.) Accepted as evidence.

Q. What is this letter?

A. An enclosure received from Mr. Blake in a letter which has been submitted to the Court, being Mr. Blake's brief to Mr. Potter in the arbitration arranged between Mr. Steele and the American Trading Company of Tokyo.

Q. Did you write to Mr. Blake and ask him for the documents and papers in the Steele matter?

A. I did.

Q. And as a result of that letter you received a letter dated June 10th, 1919. A. Yes.

Q. And in that letter this was enclosed?

A. Yes. He stated in that letter that he was handing me all of these papers covering the entire case and awaiting the decision of the arbitrator, which he sent with it.

Q. What is this, Mr. Burns?

A. A letter from Mr. Steele to Mr. Blake, dated March 19, Tokyo.

(Handing witness Defendant's Exhibit No. 4.)

Q. What is that, Mr. Burns?

A. The decision of Mr. Potter, the arbitrator, in the case of Steele v. Blake.

Q. Was that enclosed in the letter of June 10th?

A. Yes, it is specifically mentioned in that letter.

Q. Did you write to Mr. Blake asking for the papers in the Steele matter? A. Yes.

Q. And as a result of that letter you received a letter of June 10th, enclosing—including enclosures, one of which is this? A. Yes.

Q. (Handing witness Defendant's Exhibit No. 5.) What is this, Mr. Burns?

A. A letter written by Steele to Ward.

Q. Was that included in the letter of June 10th?

A. Yes.

Q. The letter of June 10th was an answer to a letter that you wrote requesting Mr. Blake to send you all the papers in the Steele matter? A. Yes.

Q. And this was enclosed in that letter? A. Yes.

(Handing witness Defendant's Exhibit No. 6.)

Q. What is this, Mr. Burns?

A. Another letter written by Steele to Ward, dated April 17.

Q. Was that enclosed in the letter of June 10th?

A. Yes.

Q. And the letter of June 10th was in answer to a request for all papers in the Steele matter?

A. Yes.

Q. And this was enclosed in the letter of June 10th? A. Yes.

(Handing witness Defendant's Exhibit No. 7.)

Q. What is this, Mr. Burns?

A. A letter from Mr. Steele dated March 19th.

Q. (Handing witness Defendant's Exhibit No. 8.) What is this, Mr. Burns?

A. A letter from Mr. Blake to Mr. Steele dated May 6th.

Q. Was this enclosed in the letter of June 10th?

A. It was.

Q. (Handing witness Defendant's Exhibit No. 9.) What is this, Mr. Burns?

A. A letter from Mr. Blake to Mr. Steele, dated March 19th.

Q. Was that enclosed in the letter of June 10th?

A. Yes.

Q. (Handing witness Defendant's Exhibit No. 10.) Now, what is this, Mr. Burns?

A. Letter of Mr. Blake addressed to Mr. Ward, San Francisco, dated March 19th.

Q. This was enclosed in the letter of June 10th?

A. Yes.

Defendant's Exhibits 1 to 10, inclusive, offered in evidence.

Mr. FESSENDEN. I object to the admission of Defendant's Exhibits Nos. 2, 5, 6, 8, 3 and 10 on the ground that they are inadmissible under the order of January 14th, 1920.

The COURT. Ruling reserved.

Seventh Exception.

To which ruling of the Court the defendant then and there excepted.

Q. Mr. Burns, where are,—as far as you know, where are the original letters of which the one is enclosed in the letter of June 10th, are copied?

A. In the case of the papers relating to the arbitration, they are in the hands of Mr. Potter, the arbitrator, who has left Tokyo and has gone to

Philadelphia, and Mr. Blake, who has gone to London to take charge of our London office.

Q. Have you endeavored to get a certified copy of these?

A. Yes, we tried to get it from the Minister at Tokyo and he said it should be obtained from Mr. Potter and we have cabled to America to try to get copies of all the papers in the arbitration.

Q. You have used every effort to try to get the original papers or certified copies? A. Yes.

Q. And up to the present you have not been able to get them?

A. They have not come as yet, I telegraphed Mr. Blake at San Francisco, and at New York. The Tokyo office have. It is out of my jurisdiction completely.

Q. Mr. Blake is the only one who had any direct knowledge of this matter? The only one in authority?

A. The matter was entirely in his hands as general manager of the Company for the Far East.

Q. Has Mr. Steele ever come to the office in Shanghai and offered to enter into employment of the—— A. Never.”

Assignment Number Ten.

The court erred in holding in its written decision that the defendant was not justified under the terms of plaintiff's contract in discharging the plaintiff because his personality was displeasing to the defendant.

This assignment is the subject-matter of assignment of error No. 21, contained in the Transcript of Record at page 321.

Assignment Number Eleven.

The court erred in holding in its written decision that the contract sued upon by the plaintiff was wrongfully terminated by the defendant.

This assignment is the subject-matter of assignment of error No. 22, contained in the Transcript of Record at page 321.

Assignment Number Twelve.

The court erred in receiving evidence of the plaintiff in respect of the efficiency of his services and the satisfaction of the defendant therewith over the objections of the defendant, and in reserving a ruling upon said objections, and thereafter in failing to rule upon said objections prior to its decision.

This assignment is included within assignment of error No. 9, appearing in the Transcript of Record at page 295, and the subject-matter thereof was hereinbefore set forth under assignment Number Two.

Assignment Number Thirteen.

The court erred in holding in its written decision that the award of the arbitrator selected by the parties and to whom their dispute was referred, not only was not binding upon the plaintiff, but was void and contrary to law.

This assignment is the subject-matter of assignment of error No. 23, appearing in the Transcript of Record at page 321. The award referred to is as follows:

“Arbitration of case A. Tilton Steele v. D. H. Blake,
Vice President, American Trading Co., Tokyo,
Japan.

Mr. A. Tilton Steele has a contract with the American Trading Co. (Pacific Coast) a company which Mr. D. H. Blake states is an associated but with a separate and distinct organization from his American Trading Co. in Tokyo. The American Trading

Co. (Pacific Coast) signed by Lewis A. Ward, Vice President and Manager makes a three year contract from July 1st, 1918, with Mr. Steele as chief accountant at their Shanghai office including transportation thereto. On his way to Shanghai Mr. Steele was stopped at Yokohama by wireless from Mr. Blake and requested to assume temporarily the duties of a Mr. Boyd of the Tokyo office while the latter was away on a holiday. In the meantime it developed that Mr. Steele's services were not needed at Shanghai and Mr. Blake states in writing that he began to negotiate with Mr. Steele for a cancellation of his contract and recommends to Mr. Steele that the matter should be referred to Mr. Lewis A. Ward, vice-president and manager of the American Trading Co. (Pacific Coast) who had made the contract hereinbefore mentioned. Mr. Blake also writes that he never had any intention to disregard Mr. Steele's rights under this contract. In Mr. Blake's letter dated March 19th, 1919, he writes in part as follows: 'We have received word from Mr. Burns, agent of Shanghai office that as he has made satisfactory arrangements with Mr. Manley (the chief accountant whose position under the contract Mr. Steele was to take) to remain with the Company, he Mr. Burns did not now wish Mr. Steele to come to Shanghai. We also confirm our statement that as soon as Mr. Boyd returns to his position in Tokyo, probably about the end of April 23 have no further use for your services here, we cannot say what your recourse will be under your contract, but as intimated the other day the writer will be glad to render you such assistance as he can in order to effect a mutual satisfactory settlement—but before anything can be done in this connection it will be necessary for you to make some suggestions in premises.'

Mr. Blake's next letter is May 6th, in which he demands the return of a number of keys which he claims belong to the company and notifies Mr. Steele that he has a debit balance of Yen 541.21 which he asks payment of at once to Mr. Blake. Mr.

Blake's letter to Mr. Steele dated August 27th, 1918, employs him temporarily in Tokyo for practically the same salary as his contract, said temporary employment to be for such time as Mr. Boyd is absent on holiday, which Mr. Blake estimates will be about six months. Mr. Blake further adds in this letter this time will of course apply to Mr. Steele's three years' term as mentioned in original contract. Mr. Blake concludes this letter as follows: 'It is understood between us that this temporary arrangement does not prejudice any verbal understanding which you (Mr. Steele) may have had with Mr. Ward or with Mr. Burns prior to your departure from San Francisco.'

Mr. Steele also claims that he had a verbal understanding in San Francisco with Mr. Burns of the Shanghai office, that his passage back to San Francisco including all legitimate travelling expenses were to be paid by the Company and that both Mr. Ward and Mr. Burns stated to him (Mr. Steele) that this was the custom of the company in all cases of covenanted servants and that Mr. Steele would of course be treated in the same way.

After reading over carefully the briefs which have been submitted by both Mr. Blake and Mr. Steele *I am of the opinion that the matter of the three year contract should be referred to Mr. Ward in San Francisco for settlement.*

Second. That Mr. Blake should pay Mr. Steele in full until such time as Mr. Steele can secure first-class passage back to San Francisco less any indebtedness that may be proved that Mr. Steele owes Mr. Blake.

Hoping that this conclusion may be mutually satisfactory, I am, gentlemen,

Yours very sincerely,

(Signed)

P. S. Mr. Steele's passage to San Francisco to be paid by Mr. Blake's Corp.

To Mr. D. H. Blake,

Vice-President American Trading Co.,
Tokyo, Japan."

Assignment Number Fourteen.

The court erred in denying defendant's motion for a commission to take the deposition of D. H. Blake, through the denial of which motion the defendant was prevented from introducing any direct evidence as to the unsatisfactory and inefficient service of the plaintiff.

This assignment is the subject-matter of assignment of error number twenty-eight appearing in the Transcript of Record at page 325.

Assignment Number Fifteen.

The court erred in holding that the plaintiff was entitled to recover as damages the unpaid balance of his contract compensation during the unexpired term of the contract of employment (i. e., \$7500) rather than the amount of the contract compensation which had accrued up to the time of trial.

This assignment is the subject-matter of assignment of error No. 24, appearing in the Transcript of Record at page 324.

Assignment Number Sixteen.

The court erred in failing to deduct from the amount of the judgment awarded to the plaintiff the sum of \$507.00 admittedly due from the plaintiff to the defendant.

This assignment is the subject-matter of assignment of error No. 25, appearing in the Transcript of Record at page 325.

Argument.

I.

THE DEFENDANT DID NOT BREACH ITS CONTRACT BY DISCHARGING THE PLAINTIFF, BECAUSE IT WAS AUTHORIZED BY THE CONTRACT TO DISMISS HIM WHENEVER HIS SERVICES WERE "UNSATISFACTORY" OR WHENEVER HE CEASED TO DO HIS WORK IN AN "EFFICIENT" AND "SATISFACTORY" WAY, OF WHICH FACTS THE DEFENDANT WAS THE SOLE JUDGE.

The contract of employment which is the basis of plaintiff's action, was executed in San Francisco, California. It contains a clause reading as follows:

"Satisfactory Service: The undertakings herein contained on our part are all conditioned upon your doing your work in an efficient and satisfactory way."³⁰

It is the defendant's position that under this contract it had the right to discharge the plaintiff whenever the services of the plaintiff ceased to be "satisfactory" *to the defendant*. Contracts providing that work shall be done, or services rendered by one party to the "satisfaction" of the other party are common. So frequently have they come before the courts that it may be said that the rights to which they give rise are no longer doubtful. It will be necessary to do no more than refer to a few cases and decisions to establish the proposition that where a person contracts to render personal services to the "satisfaction" of his employer, he may be discharged whenever the employer becomes dissatisfied with his services. The employee may feel

and prove that he has not been fairly treated by the employer; he may feel and prove that the employer acted *unreasonably* in feeling or expressing dissatisfaction with his services; he may feel and prove that his employer was not *justified* in his dissatisfaction. But on none of these grounds can the employee deprive his employer of the right vouchsafed by the contract to terminate the employment *whenever the employer feels dissatisfied*. The rule expressed in all of the authorities is that under a contract requiring an employee to render services to the satisfaction of his employer, the employer has the right to terminate the contract whenever he becomes dissatisfied with the employee, and the reasonableness of his action or the justification for his dissatisfaction cannot be inquired into by court or jury. The employer's dissatisfaction with the employee's services gives the absolute right to terminate the contract of employment and discharge the employee regardless of any justification or lack of justification in the employer, and without regard to the reasonableness or unreasonableness of his action. In other words, *the employer is the sole judge as to whether or not the services of the employee are to his satisfaction*.

Having in mind that the contract sued on was executed in California, it is well at the outset to note the California rule upon the subject.

In *Tiffany v. Pacific Sewer Pipe Co.*, 180 Cal. 700 (1919) the contract was one for personal services. The plaintiff was engaged as an expert glazeman in the manufacture of brick, for a three-year term. The con-

tract, which was in writing, contained a provision for the termination of the contract if for any reason the employee was unable to turn out glazed brick “satisfactory to the defendant. It will be noted that the “satisfactory” clause referred to the product of the employee’s services rather than to his services, a distinction, however, which is without a difference. The employee was discharged, and thereafter commenced suit *and recovered a judgment in the trial court*. Upon appeal, however, the judgment was reversed. In the opinion the court quotes with approval from 13 Corpus Juris at page 675, as follows (p. 702):

“In contracts involving matters of fancy, taste, or judgment, when one party agrees to perform to the satisfaction of the other, *he renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision, and a court or jury cannot say that such party should have been satisfied where he asserts that he is not.*”

Applying the rule to the facts of the case before it and holding that the contract constituted the defendant employer the sole judge of whether the quality of brick produced was “satisfactory” or not, the court said (p. 705):

“All these matters would of necessity be determinable by the taste or judgment of the defendant’s managers. And as their experience in the business was an essential element in the exercise of that judgment, it could not have been intended that some other person’s judgment should determine the question of satisfactory performance. An express stipulation or necessary implication would be necessary to give such a contract that mean-

ing. This contract neither declares it directly, nor requires it by implication. The terms of the contract imply that the defendant was not compelled to be satisfied if the quality produced equaled that which was being produced at the time the contract was made. The addition of the phrase 'and satisfactory to the Pacific Sewer Pipe Company' implied a complete satisfaction and authorized the defendant to reject the brick or discharge Tiffany under the terms of the contract if for any reason of any character the quality or quantity of the product was not satisfactory. We think the contract falls within the rule applicable to cases where the judgment of the promiser is involved, and that *his decision that he is not satisfied is conclusive on the other party and upon the court to which the question is presented.*"

Tyler v. Ames, 6 Lansing 280 (1872), involved a contract of hiring whereby the plaintiff was engaged as defendant's agent in the sale of engines manufactured by defendant "for the term of one year *if plaintiff could fill the place satisfactorily*". The plaintiff was discharged by the defendant during the term of the contract, whereupon plaintiff commenced suit for alleged breach of contract. As in the case at bar, *the plaintiff had judgment*. Upon appeal, however, the judgment was reversed. Said the court (p. 280):

"It was for defendant to determine when plaintiff failed to fill the place of agent satisfactorily, and I know of no one who is authorized to review his decision.

The word 'satisfactorily' refers to the mental condition of the employer, and not the mental condition of a court or jury. The right of determining whether the plaintiff filled the place of agent satisfactorily must, from the nature and

necessity of the case, belong to the person whose interests are directly affected by the plaintiff's action. To require the employer, under such a contract, to prove that plaintiff did not fill the place satisfactorily, would be to require of him an impossibility, unless his own oath was taken as to his mental status on the subject. If he is required to prove facts and circumstances that would justify him in feeling dissatisfied with the manner plaintiff filled his office, it would be annulling this clause of the contract, as, without such a clause, he would have the right to dismiss the plaintiff if he did not properly perform his duties.

The question is quite similar to the one that is sometimes raised on chattel mortgages, containing a clause authorizing the mortgagee to take the property and sell it when he deems himself insecure. The weight of authority is in favor of the right of the mortgagor to take and sell the property without any obligation to prove that the facts and circumstances surrounding the parties justified him in deeming himself insecure."

Kendall v. West, 196 Ill. 221, 63 N. E. 683 (1902), involved a contract for the rendition of theatrical services. The contract was terminated by the employer, whereupon suit was brought. Judgment went for the defendant, and upon appeal was affirmed. Said the court (p. 584):

"The contract of employment provided that appellant should render 'satisfactory services' for which he was to receive the sum of \$250 per week. It contained no provision in any manner limiting the appellee in the exercise of his judgment as to what should be deemed 'satisfactory services'. *The appellant did not undertake to render services which should satisfy a court or jury, but undertook to satisfy the taste, fancy, interest, and judgment of appellee.* It was the appellee who was to

be satisfied and if dissatisfied, he had the right to discharge the appellant at any time for any reason, *of which he was the sole judge.*”

In *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157 (1893), it is said (p. 159):

“It is settled law that, where a person contracts to do work to the satisfaction of his employer, the employer is the judge, and the question of the reasonableness of his judgment is not a question for the jury.”

It is obvious, of course, that for a court or jury to hold that the dissatisfaction of an employer was not justified, or that the employer acted unreasonably in expressing dissatisfaction with the services rendered, is to create a new contract for the parties. The employer executes a contract whereby he exacts certain services *satisfactory to him*; the court executes for the employer a contract whereby the employer must be satisfied *if the services are satisfactory to the court*. Of course, employers would not enter into contracts requiring the rendition of services satisfactory to them if they had any reason to believe that the obligation of the employee would be discharged by rendering services which, *in the opinion of a third person*, should have satisfied the employer, although they did not, in fact, satisfy him.

To the effect that the employer is the sole judge of whether the services rendered are “satisfactory” or not, see, further,

Campbell v. Thorp, 36 Fed. 414 (C. C. E. D. Mich. 1888);

Krompier v. Spivek, 170 Ill. App. 621 (1912).

In the latter case the syllabus reads as follows:

“An employment contract by which an employe agrees to render services ‘satisfactory’ to his employer may be terminated by the employer if the services rendered are not satisfactory to him and *such employer is the sole judge as to whether the services are satisfactory.*”

See also:

Gwynne v. Hitchner, 66 N. J. L. 97, 48 Atl. 571 (1901).

In the opinion in the case last cited the court refers to *Brown v. Foster*, 113 Mass. 136 (wherein the plaintiff agreed to make for the defendant a “satisfactory” suit of clothes, and the defendant had returned the suit as unsatisfactory) and points out that the Supreme Court of Massachusetts recognized that the judgment of the defendant was conclusive, saying:

“even if he ought to have been satisfied, the action would not lie; that, when the contract permits the defendant to decide for himself, he cannot be deprived of that contract right.”

In *Aquinto v. Fischer*, 165 N. Y. S. 369 (App. Div. 1917), the plaintiff recovered judgment in a suit brought for an alleged wrongful termination of a contract by an orchestra leader against a theater proprietor. The contract contained a clause that the orchestra agreed “to perform their duties faithfully at all times and *to the satisfaction of the manager of*” the defendant. In reversing the judgment for the plaintiff the court said (p. 370):

“The services contracted for clearly fell within the principle involving the exercise of taste, fancy,

skill, or professional judgment, and *the satisfaction of the employer was to be determined solely by the employer, and not by the court or the jury.*" (Citing previous New York cases.)

Similar in principle to the foregoing cases is one decided by this court. See

Cressey v. International Harvester Co., 206 Fed. 29 (C. C. A. 9th, 1913).

In the case cited the contract provided that the employer might terminate it whenever "it should consider the employee's work unprofitable or undesirable". In affirming the judgment in favor of the employer this court said (p. 35):

"the defendant was authorized to discharge the plaintiff when it should consider his work unprofitable or undesirable. This constituted defendant the judge of when plaintiff's work was profitable or unprofitable to it, or whether it was desirable that it be continued."

See also the following cases:

American Music Stores v. Kussel, 232 Fed. 306 (C. C. A. 6th, 1916);

Mackenzie v. Minis, 132 Ga. 323, 63 S. E. 900 (1909);

Schmand v. Jandorf, 175 Mich. 88, 140 N. W. 996 (1913);

Teichner v. Pope Mfg. Co., 125 Mich. 91, 83 N. W. 1031 (1900);

Frery v. American Rubber Co., 52 Minn. 264, 53 N. W. 1156 (1893).

Cases might be multiplied indefinitely to the same effect. The cases cited, however, sufficiently illustrate the rule which as stated at the outset is, that, under a contract for the rendition of "satisfactory" services the employer is the sole judge of whether the services are "satisfactory".

The defendant having terminated the plaintiff's contract upon the ground that plaintiff's services were neither "satisfactory" nor "efficient", the plaintiff was concluded by the defendant's action unless he could both *allege* and *prove* that the defendant acted in bad faith. *The burden of proof in this respect was upon the plaintiff.*

See: *Delano v. Columbia Works & Malleable Iron Co.*, 179 App. Div. 155, 166 N. Y. S. 105 (1917). Affirmed in Memorandum Opinion, 123 N. E. 862.

In the latter case, it is said:

"In such a case, upon proof of a valid contract and discharge, the burden is undoubtedly on the defendant of coming forward with evidence that the employe was discharged because of dissatisfaction, and it is true that such dissatisfaction must be genuine; but the burden of proof upon the whole case is on the plaintiff and he must show that the claim of dissatisfaction was feigned, not genuine."

The foregoing case was quoted with approval in *Lyon v. Starr Piano Co.*, 107 Misc. 334, 177 N. Y. S. 682 (1919).

See also:

Gilman v. Lamson Co., 234 Fed. 507 (C. C. A. 1st, 1916).

In the case cited, a judgment in favor of the plaintiff in a suit for alleged wrongful discharge was reversed by the Court of Appeals because of the refusal of the District Court to instruct the jury as requested by the defendant that the burden was upon the plaintiff to prove that the termination of his contract was invalid by reason of bad faith upon the part of the defendant.

The syllabus reads as follows:

“CORPORATIONS—TERMINATION OF CONTRACT. It was error for the judge to refuse to instruct a jury that the burden is on the plaintiff to prove that the termination was invalid by reason of bad faith on the part of the directors in voting to terminate it.”

A. The reasons given by the trial court in holding that the defendant could not terminate the plaintiff's contract of employment are untenable.

The trial court held that the attempted termination of the plaintiff's contract by the defendant was wrongful, and gave three reasons for so holding. These reasons are as follows:

1. The contract of August 27, 1918, was separate and distinct from the original contract of employment made in San Francisco on May 18, 1918, and defendant's dissatisfaction with plaintiff's services under the later contract did not entitle it to terminate the prior contract.³¹
2. The reasons given to the plaintiff for his discharge at the time of the termination of his contract (which did not include any expression

31. R. 144, 145.

of dissatisfaction with plaintiff's services), precluded the defendant from thereafter claiming that plaintiff's services were unsatisfactory.³²

3. The defendant was not justified in terminating the contract.³³

We will consider these three reasons in the order in which we have stated them.

- (1) The contract of August 27, 1918, was a mere supplement to the original contract of May 18, 1918, and "unsatisfactory" services under the latter contract entitled the defendant to terminate the earlier contract.

It will be recalled that plaintiff's original contract was executed in San Francisco and provided for his employment as chief accountant at the defendant's Shanghai office. The defendant left San Francisco to take up his duties at Shanghai under this contract, and while en route to that place was stopped at Yokohama by a telegram from the defendant requesting him to proceed to Tokyo, there to assume the duties of chief accountant at the Tokyo office of the defendant during the vacation of the regular accountant. Upon arriving in Tokyo the plaintiff received a letter from the defendant³⁴ fixing the duration of his stay in Tokyo, i. e., during the vacation of the regular accountant, estimated at six months, and providing for certain additional monetary allowances to the plaintiff by reason of the increased inconvenience to which he may have been subjected by his change of plans. The letter further pro-

32. R. 150.

33. R. 150.

34. R. 31.

vided that the services to be rendered by the plaintiff in Tokyo should “*of course apply on your three years’ term as mentioned in your original contract*”. It is the defendant’s position that this contract was a mere supplement or amendment to the original contract. It specifically provides that the services rendered under it should constitute services under the three-year contract. How services rendered under the subsequent contract of August 27th *should constitute services under the original contract of May 18, 1918*, is inconceivable except upon the view that the latter contract within the contemplation of the parties was a mere amendment of the earlier contract. The fact is that the defendant made a contract for three years with the plaintiff as chief accountant and designated Shanghai his place of employment. Subsequently it developed that the plaintiff’s services would be needed by the defendant at Tokyo for a part of the three-year period, and the supplemental agreement was executed providing that the plaintiff should work in Tokyo during the time that his services were required there, and should receive certain additional monetary allowance to compensate him for any increased inconvenience due to the change of location. This being so, it is evident that the provision of the original contract in respect of “*satisfactory service*” was applicable to all services rendered by the plaintiff for the defendant.

The only services rendered by the plaintiff for the defendant were rendered in Tokyo. Such services were subject to all of the provisions of the original contract executed in San Francisco on May 27 (except insofar as

that contract was expressly modified by the later contract of August 27), because the express provision of the later contract made it so.

A new contract with reference to the subject-matter of a former one does not supersede the former or destroy its obligations, except insofar as the new one is inconsistent therewith. This rule of course is elementary. See, however, as illustrating it, the following cases:

Orpheus Vaud. Co. v. Clayton Inv. Co., 41 Utah 605, 128 Pac. 575 (1912);

Boody v. Rutland etc. Co., 3 Blatch. 25, 3 Fed. Cas. 857 (1853);

Hoffman v. Murphy, 44 Colo. 107, 96 Pac. 780 (1908);

Myers v. Carnahan, 61 W. Va. 414, 57 S. E. 134, 136 (1907).

It is clear, therefore, that if the services of the plaintiff in Tokyo were "unsatisfactory" to the defendant the latter was justified in terminating the original contract of May 27th, 1918.

The trial court argued that the dissatisfaction of the defendant with plaintiff's services *at Tokyo* could be no justification for terminating a contract providing for services *at Shanghai*; it held that the plaintiff never had an opportunity of rendering any services *at Shanghai*, and, therefore, that it was impossible for the defendant to determine whether or not the plaintiff's services were "unsatisfactory", because he had not been given any opportunity to render services *at the place where the contract provided that they should be rendered*. The

answer of course to this argument is twofold: First, the letter of August 27, 1918, was not a separate, independent contract, but was rather only an amendment of the original contract of May 27th, and did not abrogate or nullify or affect any of the provisions of the earlier contract except in respect of a temporary place of employment of the plaintiff and of the compensation which he was to receive during such temporary period. Particularly the later contract did not affect the provision of the earlier contract requiring the plaintiff's services to be "satisfactory" to the defendant; and second, there is no reason why the defendant should be compelled to permit the plaintiff to render services *in Shanghai* when its experience *in Tokyo* with the plaintiff convinced it that he would be neither "efficient" nor "satisfactory" *in Shanghai*. The quality of the services rendered by the plaintiff *in Shanghai* would be no different from those rendered *in Tokyo*. If the plaintiff were an "unsatisfactory" accountant *in Tokyo* he would necessarily be an "unsatisfactory" accountant *in Shanghai*. The argument that the plaintiff was not given an opportunity to demonstrate his fitness and capabilities *in Shanghai* (although he failed *in Tokyo*) savors too much of subtlety and refinement to be the foundation of a judgment of \$7500 against the defendant.

- (2) The fact that the reasons for plaintiff's discharge given by the defendant to the plaintiff on March 19, 1919, did not include any expression of dissatisfaction with the plaintiff's services did not estop the defendant from thereafter claiming that the real reason for plaintiff's discharge was "unsatisfactory" services, or preclude the defendant from showing the real reasons which prompted it to terminate the plaintiff's contract of employment.

It will be recalled that the plaintiff's contract of employment was terminated by the defendant on March 19, 1919, (or rather, evidenced by a letter of that date) while plaintiff was still employed in the defendant's Tokyo office. On that day the plaintiff received a letter from the defendant which confirmed *the verbal expression to like effect of a "few days before"* that "Mr. Burns, Agent of our Shanghai Office * * * had made satisfactory arrangements with Mr. Manley to remain with the Company", and for that reason did not wish the plaintiff to "come to Shanghai".³⁵

On the same day the defendant addressed a letter to Mr. L. A. Ward of San Francisco, who was a friend of the plaintiff, and through whom plaintiff's contract of May 27, 1918, had been negotiated. With the letter to Mr. Ward was enclosed a copy of the letter addressed by the defendant to the plaintiff, and among other things the letter to Mr. Ward contained the following:

"You will perhaps not be prepared for the news that Mr. Steele is not going to Shanghai to our office at that port. I presume that when Mr. Burns went through San Francisco this matter was not discussed with you, because Mr. Burns thought at that time that Mr. Steele would replace Mr. Manley

after the return of Mr. Boyd to Tokyo from his short holiday. In the meantime Mr. Burns has made satisfactory arrangements with Mr. Manley and desires to continue his services with the Company—and that being the case, he has no position for Mr. Steele.’’³⁶

The trial court took the position that these two letters of the defendant on March 19, 1919, in which nothing was said “about unsatisfactory or inefficient services” precluded the defendant from thereafter claiming that the real reason for plaintiff’s discharge was his *inefficient* and *unsatisfactory* services.³⁷ The court’s position seems to have been that because “the only cause assigned for plaintiff’s dismissal (in the two letters) “was that the Shanghai office had persuaded another to remain in his place”, the defendant was estopped to urge another or different reason. The court argued that the defendant was bound by its “position at the time of the dismissal”,³⁸ and that, not having taken the position with the plaintiff and informed him at that time that he was discharged because of inefficient and unsatisfactory services, the defendant could not thereafter claim that he was discharged for any such reason. In so holding we submit that the court committed grievous error, both of law and of fact. We shall shortly show by an abundance of authority, that the defendant was entitled to dismiss the plaintiff without giving him any reason at all, provided it was in fact dissatisfied with his services. We shall further show that the reasons given by the

36. R. 136.

37. R. 150.

38. R. 150.

defendant at the time of his discharge were, as matter of law, inconsequential, provided that the defendant was, in fact, dissatisfied with plaintiff's services, and that, notwithstanding any reason given to plaintiff at the time of his dismissal, the defendant could thereafter, at any time, show that the dismissal was occasioned by plaintiff's "unsatisfactory" service. We shall deal first, however, with the error of fact into which the court fell. This requires a brief analysis only of the letter of March 19, 1919, from the defendant to the plaintiff. This letter opens as follows:

*"With reference to our conversation of a few days ago, we beg to confirm what we told you at that time, to the effect etc."*³⁹

It will be noted, therefore, that the letter did not afford the plaintiff the first news of the termination of his contract. This had been done in a conversation preceding the letter by "a few days". The whole tenor of the letter indicates that the plaintiff was satisfied with the arrangement which terminated the contract. It manifests that the plaintiff was in accord with the defendant's course. The letter of the defendant to Mr. Ward on the same day, *viséd by the plaintiff and approved by him*, as we shall later show, proves conclusively that the plaintiff made no objection to the termination of his contract, but on the contrary, was satisfied that the contract should be terminated. The defendant's letter to Mr. Ward states as follows:⁴⁰

39. R. 135.

40. R. 136.

“I had explained the whole situation to Mr. Steele and I think he fully understands the reason for the action which has been taken. *I am pleased to say that he has accepted the situation very gracefully indeed and is quite willing to come to a friendly understanding with the American Trading Company.*

I have suggested that in view of the fact that his contract was made with your good self, he return to San Francisco in due course and come to a settlement with you, and he has been very agreeable to this suggestion.

I think I am correct in saying that Mr. Steele is not altogether satisfied with life in the Far East, and that he is not sorry that his stay here is not to be prolonged, even to the extent of the contract which he entered into.

He is, however, desirous of obtaining some kind of a Government appointment in India, and he tells me that you were fully acquainted with his wishes in this respect at the time you entered into negotiations with him on behalf of the American Trading Company. He would like us to render him such assistance as we can to enable him to get such an appointment, and I have told him that we would provide him with such letters of recommendation as we could, but beyond that I cannot see that we can be of any material assistance. However, I hope that you will do anything that you are able to do in his behalf.

I cannot say at this writing just when Mr. Steele will return to San Francisco, but I am expecting that Mr. Boyd will be back here not later than the end of April, and in that case probably Mr. Steele could get away from here sometime during May.

I am giving Mr. Steele a copy of this letter.”

That this letter was viséd and okehed by the plaintiff before being sent to Mr. Ward is conclusively

established by the postscript attached thereto, which reads as follows:

“P. S. Since writing the above, *Mr. Steele* has called my attention to the fact that my remarks with reference to his not being satisfied with life in the Far East are not exactly in accordance with facts. His proposition is that he is not pleased with life in Japan, but that as far as China is concerned he believes that he would have been entirely satisfied to have completed his contract in that Country.”

It appears, then, that after the letter to Mr. Ward was written it was read by the plaintiff and the writer's attention was called to the fact that certain statements were not “exactly in accordance with facts”; accordingly the writer in a postscript corrected the letter to conform “exactly” with the facts as stated by the plaintiff. No exception was taken by the plaintiff to the statement in the letter that the whole situation had been explained to the plaintiff and that he fully understood and appreciated the defendant's action in terminating the contract and took no exception to it. The two letters therefore which the plaintiff and the trial court hold up as conclusive proof that the plaintiff's discharge was not occasioned by “inefficient” or “unsatisfactory” service, upon their face explain the reasons why the defendant did not inform the plaintiff that the termination of his contract was due to his “inefficient” or “unsatisfactory” service. The termination of the contract was an amicable arrangement between the parties. The plaintiff understood the entire situation, and in a spirit of amity with the de-

fendant accepted the same. As shown by the defendant's letter to Mr. Ward the plaintiff was seeking the good offices of the defendant to secure for him a Government appointment in India, and the defendant had engaged to do what it could to further the plaintiff's ambitions in that direction. Under these circumstances, is it to be expected that the defendant would inform the plaintiff that his contract was terminated and he was discharged from its service because of "inefficient" or "unsatisfactory" service? The defendant was assuming, and had the right to assume, that the matter of the cancellation of the contract was one of mutual agreement between it and the plaintiff. Such an understanding breathes forth from every line of the two letters of March 19, 1919, and is the only deduction possible from the plaintiff's concurrence in the expressions of the defendant's letter to Mr. Ward. The defendant, therefore, believing, and having the right to believe, that the cancellation of the contract was agreeable to the plaintiff, and that he had no objection to it, was not called upon to assert a right (of discharge) which it would have been necessary to assert only in the event that the plaintiff was resisting a termination of his contract and disputing the right of the defendant to discharge him. We submit, therefore, that for the trial court to hold up the two letters of March 19, 1919, as conclusive proof that the defendant did not terminate the plaintiff's contract because of his inefficient or unsatisfactory services, is to ignore the impulses of human nature. Men do not gratuitously affront those with whom they have no dispute. The de-

fendant was anxious to get rid of the plaintiff. It had a right to say to the plaintiff "your services under your contract have been inefficient and unsatisfactory, and therefore we terminate your contract and discharge you". It did not choose to take this course initially, but, on the contrary, assumed a conciliatory attitude toward the plaintiff. In a spirit of amity it discussed the situation with the plaintiff, and he made no objection to the termination of his contract; on the contrary, expressed a wish to obtain a Government position in India, *which of course would have rendered it impossible for him to continue with his contract*, and solicited the defendant's good offices in securing him such a position. There was no need, therefore, for the defendant to have informed the plaintiff that it discharged him and terminated his contract on account of inefficient and unsatisfactory services; the matter of the cancellation of the contract and of the discharge of the plaintiff had been accomplished (according to the defendant's understanding) without friction, without acrimony, and without dispute. From the aspect of a question of fact alone, therefore, we submit that the holding of the trial court that the two letters of March 19, 1919, established that the plaintiff was discharged for a reason other than unsatisfactory service, is without support in the evidence.

In its decision the trial court, speaking of the defendant's letter of March 19, 1919, to Mr. Ward, and of the fact that no mention was made therein about "unsatisfactory or inefficient service", says:

“He [defendant’s manager] was writing to another company official, *and could speak without reserve*, yet the only acts assigned for plaintiff’s dismissal was that the Shanghai office had persuaded another to remain in his place.”⁴¹

This comment of the court was not justified because it overlooks or ignores the fact shown on the face of the letter, that a copy of the same was to be given to the plaintiff. Necessarily the “reserve” of which the court speaks would be lacking if it were the design of the writer to apprise the plaintiff of the contents of the letter.

Having discussed the question from the aspect of a question of fact, we will deal with it briefly as a question of law, and will demonstrate the following propositions:

1. It is immaterial whether or not all or any of the grounds upon which an employer rests his discharge of a servant were known to him when he discharged the servant.
2. It is not necessary for a master to assign any reason for the discharge of the servant at the time he discharges him.
3. The reasons given at the time of a discharge do not estop the master or preclude him from later asserting some other or different reason, whether known to him at the time of the discharge or not.

The principle resulting from the propositions just stated is that the dismissal of a servant is justified if

it appears that a sufficient cause therefor did exist, even if not expressed to the servant at the time of his dismissal.

In *Farmer v. First Trust Co.*, 246 Fed. 671 (C. C. A. 7th, 1917), the syllabus reads as follows:

“Even if the cause assigned for dismissal of an employee was not in itself sufficient, the dismissal is justified if it appears that sufficient cause therefor did in fact exist.”

In support of the proposition just stated many cases are cited in the body of the opinion.

In *Independent Life Ins. Co. v. Williamson*, 152 Ky. 818, 154 S. W. 409 (1913), the syllabus reads as follows:

“An employer was not precluded from showing that he discharged an employe because he did not perform his duties as agreed, or because his habits were objectionable, because in the letter requesting his resignation the employer stated that he had decided to reduce the force, so that employe’s services were not longer required.”

In the opinion it is said (p. 411):

“It is true that in the letter of dismissal O’Kain said he discharged appellee because the company had decided to reduce its force, and did not assign as a reason for the discharge the fact that appellee was not fulfilling his contract. *But the company was not precluded by the reason assigned in this letter from showing that appellee was discharged because he failed to perform his duties in the manner stipulated in the contract, or because his habits and conduct were objectionable.*”

In *Macauley v. Press Publ. Co.*, 170 App. Div. 640, 155 N. Y. S. 1044 (1915), the syllabus reads as follows:

“Where an employe’s disregard of orders as to his hours of work justified his discharge, it was immaterial that he was discharged on account of a matter unconnected with such disobedience of orders.”

See also:

Thomas v. Beaver Dam Mfg. Co., 157 Wis. 427,
147 N. W. 364 (1914).

In this case the court *reversed a judgment for plaintiff* in an action for damages for wrongful discharge of an employee. It appeared that the employer *when it discharged the employe gave as its reason that it had concluded to change its mode of selling*. The trial court took the position that the reason so assigned was conclusive upon the defendant and that it could not thereafter show that its real reason for discharging the plaintiff was other than that stated. The Supreme Court of Wisconsin, dealing with this point, said (p. 365):

“If when respondent was discharged there existed an uncondoned justification therefor, regardless of whether it was then known to appellant, or whether the reason assigned for such discharge was sufficient, the trial court erred in holding that appellant was precluded by the first or any notice of discharge from proving an existing ground not therein referred to. *Loos v. Geo. Walter Brewing Co.*, 145 Wis. 1, 6, 129 N. W. 645, 140 Am. St. Rep. 1052; *Von Heyne v. Thompkins*, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. (N. S.) 524; *Crescent Horse Shoe Co. v. Eynon*, 95 Va. 151, 27 S. E. 935.”

Even if the defendant when it terminated plaintiff’s contract had been ignorant of the acts of the plaintiff which it set up in this action to justify the termination of his contract, such fact would have been

immaterial. It has been held that ignorance of a sufficient cause at the time of a servant's discharge or even up to the time of the commencement of an action therefor does not preclude the defendant from justifying its act.

See:

Boston Deep Sea Fishing, etc. Co. v. Amsell, 39 Ch. Div. 339, 357 (1888),

See, also,

Loos v. Walter Brewing Co., 145 Wis. 1, 129 N. W. 645 (1911).

In *Corgan v. Lee Coal Co.*, 218 Pa. St. 386, 67 Atl. 655 (1907) the plaintiff appealed from a judgment against him in an action for wrongful discharge. The contract of employment was "for so long a time up to five years that (plaintiff) *satisfactorily* performs his duties as foreman for said (defendant) company". The defendant became dissatisfied with the plaintiff and discharged him. At the time of his discharge the plaintiff had employed an attorney to secure from the defendant certain profits of the defendant to which he claimed to be entitled. The evidence showed that when the plaintiff was discharged the reason for this discharge given by the manager of the defendant was that "he could not have a man in his employ who was lawing him". It was argued by the plaintiff that the reason so given was the only reason upon which the defendant could rely to justify plaintiff's discharge, and that it was insufficient. The Supreme Court of Pennsylvania, dealing with this matter, said:

“It is suggested here that dissatisfaction with the manner in which plaintiff performed his duties as foreman was not alleged as a reason for the discharge; but in *Allentown Iron Co. v. McLaughlin*, 1 Mona. (Pa.) 726, it was held by this court that while the master might not have the right to discharge his servant for the cause assigned by him, *‘if, at the time, the defendant company had a right to discharge him for any cause, such discharge would not be unlawful because a wrong reason had been given for it’*. The same principle is laid down in *Wood on Master & Servant*, § 121: *‘The master is not bound to give any reason for the dismissal at the time, and if he does, he is not thereby estopped from setting up any other or different cause which really existed when the servant was discharged’*. Other authorities to the same effect are numerous. Thus in *Rossiter v. Cooper*, 23 Vt. 522, where a contract of employment provided that the employer, if he became dissatisfied, had the right to dismiss the employee, upon giving him one day’s notice, it was held that the employer was at liberty, at any time to put an end to the contract, without informing the employee of the ground of his dissatisfaction, and without in fact having any satisfactory reason for it. In *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. Rep. 157, it was said: *‘It is settled law that where a person contracts to do work to the satisfaction of his employer, the employer is the judge and the question of the reasonableness of his judgment is not a question for the jury’*. As we coincide with this view of the case, it is unnecessary to examine the grounds, which the court below regarded as sufficient to justify the defendant company in discharging the plaintiff from its employ. The evidence is ample to show that the dissatisfaction was genuine, and there is nothing to show that it was malicious. Whether or not it was well founded we need not inquire.”

The foregoing cases show conclusively that the reason for the termination of plaintiff's contract assigned by the defendant in its two letters of March 19, 1919, did not estop the defendant or preclude it from showing the real reason which actuated it in terminating the contract. If the defendant was dissatisfied with the plaintiff's services under the contract it had a right to discharge him, and it is immaterial that for the purpose of soothing the plaintiff's feelings or for any other reason it did not disclose to him on March 19th the real motive that prompted it in terminating the contract. As we have already pointed out, not only was the defendant on March 19th not called upon as *matter of law* to inform the plaintiff of its real reasons for discharging him, but to have done so would have shown a great want of tact and delicacy upon the part of the defendant, in view of the fact that the letters of March 19th demonstrate that the plaintiff accepted the cancellation of his contract without protest, and solicited the efforts of the defendant to procure for him a Government position in India. To inform the plaintiff, under such circumstances, that he was discharged for inefficient and unsatisfactory services, would be to hurt his sensibilities and wound his pride without justification or excuse. The defendant was entitled, *as matter of law* and required *as matter of delicacy and tact*, to refrain from informing the plaintiff on March 19th of the real reason for his discharge. The fact that it did not inform him on that day, however, of its real motive for terminating his contract is of no consequence in the present case. When the plaintiff sued

alleging a wrongful termination of his contract the defendant was entitled to show any fact which on March 19, 1919, or at any other time, entitled it to terminate the contract.

- (3) The trial court erred in assuming that it was entitled to inquire into the reasonableness of defendant's action in discharging the plaintiff or the justification of its action in so doing.

The trial court held that the reasons which the defendant urged as grounds of dissatisfaction with the plaintiff did not "justify" the defendant in discharging the plaintiff for "inefficient" or "unsatisfactory" service.⁴² In so holding the trial court subverted the entire principle upon which "satisfaction" contracts are based.

As we have already seen, a contract whereby one person engaged to render "satisfactory" services or services "to the satisfaction" of another, renders the employer the sole judge of whether the services are "satisfactory" or "to his satisfaction". If the employer is *dissatisfied* with the services, *it matters not that a court or jury believes that he should have been satisfied*. To inquire into the reasonableness of the employee's dissatisfaction or the justification for it is to deprive him of the right which the contract gave him to decide such matters for himself. The cases from which we have already quoted make this proposition manifest, and it is not our purpose to requote from them. However, a quotation from *Independent Life Ins. Co. v. Williamson*, 152 Ky. 818, 154 S. W. 409 (1913) from which

42. R. 150.

we quoted *supra*, is opposite in this connection. Said the court (p. 411):

“Appellee consented that the company should be the judge of whether or not he violated the contract, and agreed to leave it to it to finally determine whether or not the extent of his violation was sufficient to warrant his discharge, and this privilege the company cannot be deprived of or denied the right to exercise in good faith merely because a court or jury might not think the violation of sufficient importance to justify his discharge. *Bridgeford & Co. v. Meagher*, 144 Ky. 479, 139 S. W. 750; *Thomas v. Houston*, *Stanwood & Gamble*, 146 Ky. 156, 142 S. W. 214, 37 L. R. A. (N. S.) 950; *Corgan v. George F. Lee Coal Co.*, 218 Pa. 386, 67 Atl. 655, 120 Am. St. Rep. 891, 11 Ann. Cas. 838; *Beissel v. Vermillion Farmers’ Elevator Co.* 102 Minn. 229, 113 N. W. 575, 12 L. R. A. (N. S.) 403; *Mackenzie v. Minis*, 132 Ga. 323, 63 S. E. 900 23 L. R. A. (N. S.) 1003, 16 Ann. Cas. 723; 9 Cyc. Secs. 618-624.”

The cases cited by the court in support of this conclusion sufficiently show how well established is the rule itself.

Were we to assume, however, that the court was entitled to consider whether or not defendant was justified in being dissatisfied with the manner in which the plaintiff did his work, the record affords ample ground for such dissatisfaction.

The evidence upon which the defendant relied to show the inefficient and unsatisfactory character of plaintiff’s services is the subject-matter of Assignment of Error Number Nine hereinbefore set forth at page 17. It is not our purpose to repeat this evidence,

all of which should be read to the court if it would appreciate the difficulties which the defendant experienced with the plaintiff. Suffice it to say that such evidence shows that the plaintiff in

“his attendance on the office was so irregular as to cause great hindrance to our (defendant’s) business. It very frequently happened that he did not turn up at the office until 9:30 o’clock, sometimes 10 o’clock, or even later—this in spite of the fact that a notice is posted that our (defendant’s) office hours are from 9 o’clock”.⁴³

“On three occasions” defendant’s manager in Tokyo took the plaintiff to task for his disregard of office rules.⁴⁴ The plaintiff was in the habit of writing letters concerning the affairs of the defendant to Mr. L. A. Ward, of San Francisco, *who was not an officer of the defendant or at all interested in the defendant*.⁴⁵ This, of course, was a gross breach of confidence upon the plaintiff’s part. The plaintiff was continually making charges against various officers of the Company, against one in particular that he was receiving commissions to which he was not entitled.⁴⁶ The manager of the Tokyo office informed the manager of the Shanghai office that the plaintiff’s services “had been most unsatisfactory”, that he was very dilatory; that “he was a great disturber in the office; that he objected to methods laid down by his superiors, that he had taken on writing for the newspapers, and had written articles

43. R. 311.

44. R. 311.

45. R. 311, 312.

46. R. 128, 313.

which, if traced back to an employee of the American Trading Company might injure its business, and that all in all he would be a most unsatisfactory man for me to accept for Shanghai".⁴⁷ The articles referred to were articles written by the defendant for newspapers and magazines in Japan, and which, according to the plaintiff's own statement in a letter to Mr. Ward, might "prove very unpalatable to the oriental man".⁴⁸ The statements so made by the manager of the Tokyo office to the manager of the Shanghai office prompted the latter to refuse to accept the plaintiff at the Shanghai office, and to request the Tokyo manager to arrange for a cancellation of plaintiff's contract.⁴⁹

The foregoing is a very brief outline only of the more important matters which rendered the plaintiff "unsatisfactory" to the defendant. The defendant also objected to the "personality" of the plaintiff. It is not our purpose to discuss the latter objection at length, but we believe that a brief perusal of the plaintiff's testimony at the trial would be sufficient to indicate that this objection was well taken. Unfortunately for the defendant the testimony of the Tokyo manager of the defendant was not available at the trial. Defendant sought to take his deposition⁵⁰ but the court refused to issue a commission therefor, upon condition that the plaintiff consent to waive objection to the testimony of the Shanghai manager in respect of con-

47. R. 316.

48. R. 132.

49. R. 316, 317.

50. R. 20.

versations which he had with the Tokyo manager regarding the unsatisfactory service of the plaintiff and kindred matters.⁵¹ This the plaintiff did, so that the evidence in the record concerning the “unsatisfactory” service of the plaintiff is that of the Shanghai manager of the defendant, who narrated the conversations which he had with the Tokyo manager and the report of the latter in respect of the plaintiff which prompted him to decline to accept the plaintiff at Shanghai. Mr. Blake, who was the Tokyo manager of the defendant during the period of plaintiff’s employment in Tokyo, was in London at the time of the trial.⁵² This explains why he did not testify at the trial. Had his testimony been available we have no doubt but that the fact that the services of the plaintiff were “unsatisfactory” and “inefficient” within the meaning of the contract would have been more fully shown. In failing to take Mr. Blake’s deposition the defendant was guilty of no lack of diligence. Upon the face of the pleadings *it was admitted that the plaintiff’s services had been “inefficient” and “unsatisfactory” to the defendant, and that he had been dilatory and insubordinate.* The allegations setting up these facts in the defendant’s answer were undenied in the replication filed by the plaintiff. Under these circumstances, the defendant believed, and had every reason to believe, that the plaintiff intended to admit that his services had been “inefficient” and “unsatisfactory” in Tokyo, and merely intended to challenge the legal suf-

51. R. 21.

52. R. 19.

iciency of these facts as a defense to the action. Upon the trial, however, the plaintiff took issue with the allegations of the defendant's answer, claiming that such allegations were "deemed" to have been denied, in the absence of a reply. Whether or not this position of the plaintiff was justified by the law is the subject-matter of the next succeeding subdivision of this brief. As soon as it was apprised of plaintiff's position the defendant moved for the issuance of a commission to take the deposition, in London, of Mr. Blake, its former Tokyo manager of the defendant, and who was then in charge of its London office. In order that the trial should not be delayed by the taking of the deposition, the court exacted from the plaintiff a consent that letters that had passed between Mr. Blake and Mr. Burns, the Shanghai manager of the defendant, might be introduced in evidence without objection, and that conversations which Mr. Burns had with Mr. Blake relative to the "unsatisfactory service" of the plaintiff might be testified to without objection. This consent being given, the court denied the defendant's application for the issuance of a commission to take Mr. Blake's testimony. It is for this reason that we have the indirect and hearsay evidence of Mr. Burns in respect of the unsatisfactory and inefficient services of the plaintiff while in Tokyo. In view, however, of the circumstances under which the defendant was denied the opportunity of taking Mr. Blake's deposition and having him testify fully and directly concerning the subject-matter, we submit that every reasonable inference and presumption should be indulged in favor of the defendant

who was thus denied the opportunity of presenting fully and fairly the merits of its defense in respect of the breach by the plaintiff of the essential condition of his contract requiring “satisfactory service”.

The trial court took the position that under the contract of May 27th all that was required to be “satisfactory” and “efficient” was the plaintiff’s “way” of doing his “work” as chief accountant.⁵³ Dealing with the objection that plaintiff was tardy in reporting at the office, and dilatory in respect of office hours, the trial court said:

“Plaintiff’s duties as accountant were not like those of a salesman or other employe who must meet the public at certain hours. There is no claim that the time devoted to his work as an accountant was insufficient” (R. 149).

The defendant, however, and not the plaintiff, was to determine the office hours which the plaintiff should keep. The plaintiff could not report at the office at any hour that he chose, upon the ground that he devoted “*sufficient*” time to his work as an accountant. In the interest of order and discipline in defendant’s office defendant had the right to fix the office hours of the plaintiff, and it is no answer to a charge that plaintiff failed to keep the office hours so fixed, that he devoted “*sufficient*” time to his work as an accountant.

Again, dealing with the charge that the plaintiff had been guilty of a grave breach of confidence in re-

53. R. 146.

porting the internal affairs of the Company to Mr. Ward at San Francisco, the trial court said:

“We cannot see that what he did was any part of his ‘work’ as chief accountant” (R. 149).

In this we believe that the court was greatly in error. The plaintiff could not divulge the confidences of the office to a stranger to his manager and say that his services were not thereby rendered “unsatisfactory” because his breach of confidence had nothing to do with his “work” as chief accountant. Defendant did not employ a mathematical automation; it employed an accountant to work within a certain limited sphere, who, like every other employe of the Company, was bound by the rule of good faith to his employer, and bound to safeguard the secrets and confidences of his employer’s business. If he divulged these secrets and confidences he cannot be said to have been “efficient” and satisfactory in respect of the “way” in which he did his “work”. All of the actions of the plaintiff in respect of the defendant’s business and what he learned concerning the same have an intimate relation to the “way” in which plaintiff did his “work”.

Again, the court complained of the fact that the “particulars” of plaintiff’s “disregard of office rules” were not given.⁵⁴ But it must be borne in mind that the court did not permit the defendant to take the deposition of Mr. Blake, which, if it had been taken, would have fully shown the “particulars”. The court compelled the defendant to submit its defense of “un-

54. R. 147.

satisfactory service'' upon statements made by Mr. Blake to Mr. Burns, which were necessarily a summarization and not a detailed statement of plaintiff's deficiencies. We submit that it comes with poor grace from the trial court to criticise a condition which was the result of its own order.

II.

IN ITS ANSWER THE DEFENDANT ALLEGED THAT THE SERVICES RENDERED BY THE PLAINTIFF TO THE DEFENDANT WERE NEITHER SATISFACTORY NOR EFFICIENT, AS REQUIRED BY THE CONTRACT, AND THAT THE PLAINTIFF IN THE PERFORMANCE OF HIS DUTIES UNDER THE CONTRACT WAS INEFFICIENT, NEGLIGENT AND INSUBORDINATE TO HIS SUPERIORS. THE PLAINTIFF FAILED BY REPLICATION TO DENY THESE ALLEGATIONS, THEREBY ADMITTING THEIR TRUTH, AND, AS A CONSEQUENCE, THE DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD HAVE BEEN GRANTED.

The complaint in the action was an ordinary one for breach of contract, based upon the ground that the defendant

“wrongfully, improperly and without cause of reason on or about March 17th, 1919, dismissed and discharged the plaintiff and thereby”

wilfully broke the contract of May 27, 1918, a copy of which contract, marked “Exhibit A”, was annexed to the complaint (R. 2).

The amended answer of the defendant contained an affirmative defense, as follows:

“10. That the alleged services rendered by the plaintiff herein to the defendant were neither sat-

isfactory nor efficient, *as required in the contract alleged in plaintiff's petition, a copy of which is attached thereto and marked Exhibit 'A'*, and that the said plaintiff in the performance of his alleged duties was inefficient, negligent and insubordinate to his superiors" (R. 27).

To defendant's amended answer the plaintiff filed a replication.⁵⁵ The replication, however, did not deny any of the allegations of the affirmative defense regarding the "unsatisfactory" services of the plaintiff, nor did it deal with any of the matters involved in said affirmative defense, wherefore the defendant moved for judgment on the pleadings. The court reserved its ruling upon the motion, and in its written decision denied the same. We submit that in denying the motion the court erred.

The court in its decision took two positions: (1) that the plaintiff was not required as matter of practice to file a replication at all, and (2) that the allegations of unsatisfactory services contained in the defendant's amended answer were too vague and uncertain to call for a reply, even upon the assumption that a replication was required by the rule of practice in force in the United States Court for China.

In respect of both of these positions we submit that the court erred.

The first is concerned with the rule of practice applicable in the United States Court for China, and the second with the construction of the defendant's answer. We purpose first to discuss the question of

55. R. 28.

practice, and shall endeavor to show that under the rule of practice existing in the United States Court for China the plaintiff was required to file a replication denying any affirmative matters alleged in the defendant's answer which he did not intend to admit, otherwise, the affirmative matters so alleged were deemed to have been admitted by the plaintiff.

A. The rules of practice appertaining to the United States Court for China require the filing of a replication by plaintiff in respect of affirmative matters alleged in the answer, which the plaintiff does not intend to admit.

The United States Court for China was created by the act of June 30, 1906 (34 St. at L. 814). Section 5 of the act creating the court, provides as follows:

“The procedure of the said court shall be in accordance, so far as practicable, with *the existing procedure prescribed for consular courts in China* in accordance with the Revised Statutes of the United States. Provided, however, that the judge of the said United States court for China shall have authority from time to time to modify and supplement said rules of procedure.” (34 St. at L. 816.)

The consular regulations of 1864 were put into force by virtue of section 4085 of the Revised Statutes of the United States (see also 12 St. at L. p. 73). One section of the consular regulations so operative in the consular court in China was the following:

“in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, *the common law and the law of equity and admiralty shall be extended in like manner over such citizens and*

others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the Ministers in those countries, respectively, shall by decrees and regulations which shall have the force of law, supply such defects and deficiencies.’’

Under the foregoing it is evident that the practice in the consular court was regulated *by the common law and the statutes of the United States*. In all cases where the consular regulations, *so supplemented by the common law* and the federal statutes were deficient the Minister was empowered by appropriate decrees and regulations to provide a procedure. If a federal statute, or in its absence the common law, provided a mode of procedure such mode controlled. It is in order therefore, to inquire whether the common law or the federal statutes dealt with the matter of pleading to affirmative allegations of an answer.

The rules of common law pleading are too well known to this court to require any citation to show that a replication was necessary in all cases where the plaintiff wished to deny affirmative allegations in the defendant's answer; under the common law rules of pleading, affirmative allegations of an answer stood admitted on the record unless denied by replication. Moreover, the Alaska Code of Civil Procedure is in force in China, and binding in respect of procedure upon the United States Court for China. This Code is included in the act of June 6, 1900, "making further provision for a civil government for Alaska" (31 St. at L. 321). Chapter five of the act deals with the pleadings in

civil actions, which, on the part of the plaintiff are designated as “First, the complaint; second, the demurrer; or third, the *reply*” (31 St. at L. 341).

Chapter nine, sections 67 to 70 inclusive, deals with the reply. Section 69 reads as follows:

“Sec. 69. If the answer contain a statement of new matter, constituting a defense or counterclaim, and the plaintiff fail to reply or demur thereto within the time prescribed by law or rule of the court, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it he may have a jury called to assess the damages” (31 St. at L. 343).

Historically it is known that the Alaska Code was patterned upon the Oregon code, with which this court dealt in

Patterson v. Wade, 115 Fed. 770 (C. C. A. 9th 1902).

In the case last cited it was held that under the Oregon code providing that “every material allegation of new matter in the answer not specifically controverted by the reply shall, for the purpose of the action, be taken as true”, where facts were alleged in an answer which supported a plea of limitation, and such allegations were not specifically denied in the reply, the defendant was entitled to judgment on the pleadings.

That the Alaska code is applicable to the procedure in the United States Court for China is clear from the decision of this court in

Biddle v. United States, 156 Fed. 759 (C. C. A. 9th, 1907).

The case last cited was an appeal by a defendant from a judgment of the United States Court for China, by which he was convicted of the crime of "obtaining money under false pretenses". It was urged by the appellant that no such crime as "obtaining money by false pretenses" existed at common law or was made a crime by the laws of the United States. Dealing with the latter claim of the defendant, this court pointed out that, under the act creating it, the United States Court for China was vested with all jurisdiction *theretofore existing in the consular courts of China*, and that the jurisdiction of the consular courts under section 4086 of the Revised Statutes comprehended jurisdiction of criminal matters, "in conformity with the laws of the United States". The court then pointed out that both the Alaska code and the code for the District of Columbia made obtaining money under false pretenses a crime, and that the respective acts of Congress creating such codes were "laws of the United States" within the meaning of the statute conferring jurisdiction upon the United States Court for China.

In an Appendix to this Brief we print a decision of the United States Court for China rendered June 9, 1917, in the case of *United States v. McRae*. The decision is by the same judge who decided the case at bar, and involved an application for a writ of mandamus to the clerk of the court to compel him to record articles of a proposed corporation. The suit was brought upon the theory that the Corporation Act of Congress of March 2, 1903, designed primarily for Alaska, was applicable to China. The court so held, but denied

the application for the writ upon the ground that the *form of the proposed articles* was not in accordance with the statute. In its decision the court quotes with approval the opinion of this court in *Biddle v. United States*, supra, and holds that the Corporation Act of Congress intended primarily for Alaska was also applicable to China, because it was a "law of the United States" within the meaning of the statute creating the United States Court for China.

So, in like manner, the above-quoted section of the Alaska Code of Civil Procedure requiring a reply, and providing that a defendant is entitled to judgment upon the pleadings if affirmative allegations in his answer are not controverted by plaintiff in a reply, furnishes the rule of procedure in the United States Court for China. Whether, then, we regard the practice in the United States Court for China as being determined by the common law under the consular regulations above mentioned, or by the Alaska code under the principle announced in *Biddle v. United States*, supra, the result is the same. Both under the common law and under the Alaska code affirmative allegations in an answer, if not controverted in a reply, are deemed admitted, and if sufficient to constitute a defense entitle the defendant to judgment upon the pleadings.

Not only did the law compel the plaintiff to reply to the affirmative allegations in the defendant's answer if he wished to controvert such allegations, *but he acted upon the belief that he was required to file a reply.* It should be borne in mind that the plaintiff in the

present case did file a replication to the defendant's answer.⁵⁶ Now when the defendant urges that the reply was deficient, the plaintiff and the trial court answer *that no reply at all was required*. The defendant believed and still believes that a reply was required. Until the trial the defendant had no reason to believe that the plaintiff believed otherwise; the plaintiff actually filed a reply, thereby supporting the defendant's construction of the law. The defendant made a seasonable motion for judgment on the pleadings, based upon the proposition that the plaintiff had failed to controvert certain material affirmative allegations in defendant's answer constituting a defense, and which, uncontroverted, entitled the defendant to judgment on the pleadings. The plaintiff did not amend his reply or make any application for leave to amend. The sole question, therefore, for the court to determine was whether or not a reply was called for from the plaintiff. We submit that it was called for, and that, the plaintiff having failed to controvert the allegations of the answer in respect of the "unsatisfactory" and "inefficient" character of his services the defendant was entitled to judgment on the pleadings.

In its decision the trial court speaks of the right which it undoubtedly would have had to relieve the plaintiff from his default in failing to file a proper reply controverting the allegations of the defendant's answer in respect of unsatisfactory service.⁵⁷ This fact is of no consequence in the case. The plaintiff did not

56. R. 28.

57. R. 152.

seek to amend; the court did not permit an amendment, and no amendment was filed. In addition, if the plaintiff had amended his replication by denying the allegations of unsatisfactory service in the defendant's answer, the defendant would have been entitled, *as of right*, to the issuance of a commission to take Mr. Blake's deposition in London. In short, the question whether the defendant was entitled to judgment on the pleadings must be determined by the pleadings as they existed and still exist, and not by what they *would have shown* if the plaintiff had amended pursuant to leave which the court *might have granted*, but which *was never asked*. Not only are we not concerned here with any right of the plaintiff to amend his replication, but, as we have heretofore pointed out, every intendment and presumption should be indulged in favor of the defendant in respect of its defense of "unsatisfactory service". The defendant relied upon the failure of the plaintiff to deny the allegations of "unsatisfactory service" in its answer, and was thereby led to believe that the plaintiff did not question the truth of the allegations. For this reason the defendant did not promptly seek to take the deposition of Mr. Blake. As soon as it learned that the plaintiff intended to dispute the truth of the defendant's allegations of unsatisfactory service the defendant sought to take the deposition of Mr. Blake, by whom such allegations could be proved, and was then met by the objection of the plaintiff and the refusal of the trial court, who, in lieu of Mr. Blake's full, direct and positive testimony, compelled the defendant to rely upon the indi-

rect, hearsay, and incomplete testimony of Mr. Burns. Having been denied the opportunity of making a full presentation of its defense of "unsatisfactory service", we submit that the defendant is entitled to have its right to judgment on the pleadings determined in the light of the pleadings as they existed throughout the trial, unaffected by consideration of what might have been its right if the plaintiff had amended his replication.

We are dealing with an actual condition and not with a theoretical one. The defendant based its motion for judgment on the pleadings upon the record as it existed at the time and as it still exists. It is entitled to have such motion judged in the light of the actual facts and not in the light of a state of facts which never existed.

Closely related to the assignment of error dealing with the denial of the defendant's motion for judgment on the pleadings is the assignment dealing with the admission by the court, over the objection of the defendant, of testimony by the plaintiff in respect of the efficient and satisfactory character of his services in Tokyo. The defendant objected to any testimony by the plaintiff in respect of the efficiency of his services in Tokyo or the satisfaction of the defendant therewith, and to all testimony of the plaintiff in attempted denial of the affirmative allegations of defendant's answer pleading "unsatisfactory service". The defendant's objection was based upon the fact that the plaintiff having failed to deny the allegations of "unsatisfactory service", no issue in respect of that subject-

matter was in the case. The court, however, received this evidence *under a reserved ruling*, with which we hereafter deal. The action of the court in receiving the evidence is the subject-matter of Assignment of Error Number Two, hereinbefore set out at page 9.

It is evident, of course, that if the defendant was entitled to judgment on the pleadings on account of the plaintiff's failure to deny the affirmative allegations of unsatisfactory service, the court erred in permitting the plaintiff to testify in contradiction of the allegations of the answer. If the pleadings as they existed presented no issue in respect of the plaintiff's "unsatisfactory service" the defendant was entitled to judgment on the pleadings, and the plaintiff was debarred from offering any evidence on the subject. The court in its decision, speaking of its duty to permit the plaintiff to amend his replication by adding thereto a denial of the allegations of unsatisfactory service in the defendant's answer urges as the reason therefor that

"the case was tried on the theory that he [plaintiff] did not admit that his services were inefficient or unsatisfactory" (R. 152).

The case certainly was not tried *by the defendant* upon the theory that any issue remained in the case in respect of the unsatisfactory service of the plaintiff. Defendant, both by motion for judgment on the pleadings and by objecting to all evidence offered by the plaintiff in respect of his satisfactory service, indicated as clearly as it could its position that the pleadings had disposed of the issue of "satisfactory service". Plaintiff's theory of the case, or the mo-

tive which actuated him, is immaterial, unless it was prompted by some action of the defendant. This, however, as we have shown, was not the case.

In concluding this branch of the argument, we submit that:

1. The defendant's motion for judgment on the pleadings should have been granted, because the plaintiff admitted on the record that his services were unsatisfactory and inefficient.

2. The court erred in receiving the plaintiff's evidence in respect of the efficiency of his services and the satisfaction of the defendant therewith, in view of the fact that there the pleadings presented no issue in respect of this subject-matter, the same having been removed by the plaintiff's failure to deny the defendant's allegations of unsatisfactory service.

3. Every intendment and presumption should be indulged in favor of the testimony of the defendant in support of its allegations of "unsatisfactory service" of the plaintiff, in view of the fact that the trial court refused to issue a commission for the taking of the deposition of Mr. Blake, the former manager of defendant's Tokyo office. The trial court was not entitled to criticize any deficiency in the defendant's proof on this subject considering that such deficiency, if it existed, was due to the court's denial to the defendant of the opportunity of taking the deposition of Mr. Blake, from whom full and complete proof on the subject would have been forthcoming. The defendant's failure to make early application for a com-

mission to take Mr. Blake's testimony was due entirely to the fact that no issue was presented by the pleadings in respect of the subject of the unsatisfactory service of the plaintiff.

B. The allegations of the defendant's answer in respect of plaintiff's "unsatisfactory service" were such as required a reply if the plaintiff did not wish to admit such allegations.

The trial court in addition to holding that as matter of practice a reply was unnecessary *in any case* in the United States Court for China, held that the allegations of the defendant's answer setting up the "unsatisfactory" and "inefficient" services of the plaintiff were too vague and uncertain to call for a reply. The court invoked the rule that only material allegations which are well pleaded are admitted by failure to deny and not indefinite, indistinct and equivocal allegations (R. 151, 152.) It held that the defendant's allegations in respect of "unsatisfactory service" were indefinite and immaterial, and therefore within the operation of the rule just mentioned.

The court, after quoting the allegations of defendant's answer in respect of plaintiff's "unsatisfactory services", said:

"But what were the 'alleged services' and 'alleged duties' here mentioned? How were they alleged and by whom? The complaint alleges nothing about plaintiff's 'duties' or 'services'. Neither did the contract (Ex. 'A') require the 'services rendered by the plaintiff'—i. e., in Tokio—to be 'satisfactory or efficient'. The averment is, therefore, indefinite, whereas, to support a judgment, it 'must be distinct and unequivocal'.

Again the only services in issue here are the actual (not alleged) ones which plaintiff rendered in Tokio and the future (though not alleged) ones which he offered, but was not permitted, to render in Shanghai. None of these can correctly be included in the phrase 'alleged services' and the averment regarding them is thus also immaterial" (R. 151).

This argument of the court is both strained and illogical. It is based in part upon the premise that the "satisfactory service" clause did not apply to plaintiff's services in Tokyo, an argument not at all applicable to the question of *pleading* which the court was considering.

Again, the court dilates on the reference to "alleged" services as though there could be any doubt in plaintiff's mind as to just what defendant meant by the allegations of its answer. The defendant charged that the *only services which the plaintiff ever rendered to it*, i. e., the services at Tokyo, were inefficient and unsatisfactory, and that the plaintiff in the performance of them was dilatory and insubordinate. The court and the plaintiff knew just what the defendant meant and it is mere quibbling to say that the plaintiff may have been misled by the reference to "alleged" services in view of the fact that his services were "actual".

III.

**THE COURT ERRED IN RESERVING RULINGS ON OBJECTIONS
TO THE ADMISSIBILITY OF EVIDENCE, AND IN FAILING
TO RULE UPON SUCH OBJECTIONS PRIOR TO ITS DECISION.**

As hereinbefore stated, the plaintiff offered testimony to prove that his services in Tokyo were “efficient” and “satisfactory” to the defendant. The defendant objected to all of this testimony upon the ground that the issue of “unsatisfactory service” had been removed from the pleadings through the plaintiff’s failure to deny the affirmative allegations of the defendant’s answer setting up “unsatisfactory service” of the plaintiff.⁵⁸ The court received all of the evidence of the plaintiff on the subject, however, *under a reserved ruling*.⁵⁹ The court did not during the trial or at any time thereafter rule upon the admissibility of the evidence or the objection of the defendant. In its decision the court does not pass upon the admissibility of the evidence thus received by it, or upon the objection of the defendant to such evidence. It is true that the court in its decision refers to the testimony of the plaintiff, but nowhere in its decision does the court make a ruling upon the admissibility of such testimony. The case, therefore, in respect of the defense of “unsatisfactory service” stands as follows: The defendant pleaded affirmatively that plaintiff had been inefficient and unsatisfactory, insubordinate and dilatory. The plaintiff made no denial of these allegations *in his pleadings*. On the trial the plaintiff, *by his testimony*, sought to con-

58. Assignment of Error 12, *supra*, p. 27.

59. See footnote 58.

trovert the allegations. The defendant objected to plaintiff's testimony upon the ground that the matter no longer was at issue. The trial court declined to rule upon the objection, but received the testimony under a reserved ruling, *and at no time during the trial or thereafter in its decision ruled upon such objection.* We submit, therefore, that for this reason, if for no other, the judgment must be reversed.

The only evidence relied upon by the plaintiff to show that the defendant did not discharge him because of "inefficient" or "unsatisfactory" service, but for a reason unrelated to the character of plaintiff's service, was the testimony of the plaintiff himself. This testimony, however, is in the record over an objection of the defendant never passed upon by the trial court. Under these circumstances, such evidence cannot be considered, and the judgment must be reversed.

The Supreme Court of California has had occasion many times to consider the practice of reserving rulings to objections, which, in *Stanwood v. Carson*, 169 Cal. 640, 644 (1915), it characterized as "a practice to be reprobated and deplored".

In *Raymond v. Glover*, 122 Cal. 471 (1898), the syllabus reads as follows:

"It is error for a court not to pass upon an objection made to the admissibility of evidence, which was taken subject to a subsequent ruling as to such admissibility."

In the case cited a judgment in favor of plaintiff was reversed for failure of the trial court to pass upon

an objection to testimony upon which in a large measure the judgment rested.

See, also,

Mayo v. Mazeaux, 38 Cal. 442 (1869);

City of Stockton v. Dunham, 59 Cal. 609 (1881);

Martin v. Lloyd, 94 Cal. 195 (1892).

The failure of the court to rule upon defendant's objection to plaintiff's testimony, necessitates a reversal of the judgment in the case, regardless of the merits of defendant's other points.

IV.

THE DECISION OF THE ARBITRATOR SELECTED BY THE PARTIES, AND TO WHOM THEIR DISPUTE WAS REFERRED, WAS BINDING UPON THE PLAINTIFF, AND THE TRIAL COURT ERRED IN HOLDING THAT IT WAS NOT BINDING UPON HIM.

As previously stated, as soon as the plaintiff's contract was terminated by defendant, negotiations were entered into between the parties relative to an arbitration of their differences. At the instigation of Honorable Roland Morris, United States Ambassador to China, it was arranged that the claims of the plaintiff against the defendant should be submitted to Mr. William Potter. Accordingly each of the parties submitted to Mr. Potter a statement of his position. The plaintiff, upon his part, submitted a full and complete statement of his employment by the defendant of the services rendered by him and of his claim against the defendant. The plaintiff's statement (Plaintiff's

Exhibit “H”) is in three sections. The first comprises a so-called “chronological statement of the facts of the case” between the date of plaintiff’s employment in San Francisco and his arrival at Yokohama. The second section deals with the “Tokyo Office Period”, and of the relations of the parties during that period. Section 3 of the plaintiff’s statement comprises a “Statement of Claims” of the plaintiff against the defendant. Plaintiff’s entire statement comprises twenty pages of the record, and is set forth at pages 40 et seq. thereof.

As against the claims of the plaintiff thus submitted to the arbitrator, the defendant submitted a statement of its position and of the reasons justifying its discharge of the plaintiff. Among other things the defendant asserted that the plaintiff “adopted the attitude from the start that our system of bookkeeping was all wrong, and this of course led to more or less friction and unpleasantness”. (R. 117). Another instance of plaintiff’s “unsatisfactory service” was thus stated (R. 117-118):

“During the first few months of his stay here his attendance on the office was so irregular as to cause great hindrance to our business. It very frequently happened that he did not turn up at the office until 9:30 o’clock, sometimes 10 o’clock, or even later—this in spite of the fact that a notice is posted that our office hours are from 9 o’clock.”

Again, dealing with plaintiff’s “unsatisfactory service” as the defendant’s letter to the arbitrator states (R. 118):

“On three occasions the writer called Mr. Steele to task for his disregard of our office rules, and during one of these interviews we told him that if he found it impossible to comply with our regulations he had better return to San Francisco. Notwithstanding our repeated admonitions, he still persisted in ignoring the office rules, and we submit that on this point alone we could have found sufficient justification for cancelling his contract.”

The defendant in its letter to the arbitrator also discussed at length the clandestine correspondence of the plaintiff with Mr. L. A. Ward in San Francisco, relative to the affairs of the defendant, and asserted that this alone was sufficient to warrant the discharge of the defendant, because Mr. Ward was not even an employee, much less an officer, of the defendant, but was an officer of a separate and distinct organization.

Dealing with this correspondence, the defendant's position outlined to the arbitrator was as follows (R. 120-1):

“We submit that Mr. Steele in carrying on such correspondence was practicing both deception and treachery, and on either count he has committed an unpardonable offense.

If he acted with a realization of what he was doing, then certainly he has no excuse to offer, but on the other hand if he pleads ignorance, he convicts himself of being deficient in the most elementary principles of business.

It seems incredible that any man endowed with ordinary intelligence could so abuse the confidence of his employers as Mr. Steele has done in carrying on this correspondence.

We would respectfully submit for your consideration the following points:

1. Would Mr. Steele have been justified in writing such a letter as that of April 24th, even to the head office of the company, without the knowledge and consent of his superior officer?

2. Assuming for argument's sake that your answer to the above is in the affirmative, would he have been justified in sending the same letter to a man who had no connection whatever with the office which employed him?

3. Having committed this offense has he not proven himself irresponsible and untrustworthy?

4. In view of all the other facts would we not have had good and sufficient grounds for dismissing him from our office?"

Enclosed in defendant's letter to the arbitrator was a copy of plaintiff's original contract of May 27, 1918, a copy of the letter of March 19, 1919, confirming the termination of plaintiff's contract, and copies of three letters to Mr. Ward.

The claims of the parties having been fully set forth in the respective statements which they made to the arbitrator, the latter rendered a decision in which he pointed out that the contract of May 27, 1918, was made by the plaintiff "with the American Trading Co. (*Pacific Coast*), a company * * * with a separate and distinct organization from (the) American Trading Co. in Tokyo". (R. 124.) The fact that the plaintiff's contract was with a corporation separate and distinct from the defendant, and that the arbitrator fully understood and appreciated that fact, is of the utmost importance in considering the award of the arbitrator. In the present case the defendant by a plea in abatement and by answer asserted that

the contract, upon which the plaintiff sued, was not made with the defendant at all, but with a separate, distinct corporation, and the defendant therefore urged that it was under no liability to the plaintiff whatsoever. The plaintiff's position, adopted by the trial court, was that the American Trading Company (*Pacific Coast*) which actually executed the contract with the plaintiff, was acting in the matter merely *as the agent* of the defendant, who was its undisclosed principal. The judgment in favor of the plaintiff was based entirely upon the proposition that the defendant was an undisclosed principal in respect of the contract of May 27, 1918, made by the plaintiff with a separate and distinct corporation known as American Trading Company (*Pacific Coast*).

Having fully considered the claims of the parties in the light of the facts just stated, the arbitrator made his award as follows:

1. "I am of the opinion that the matter of the three year contract should be referred to Mr. Ward in San Francisco for settlement."
2. "Mr. Blake [Vice President and Manager of the defendant in Tokyo] should pay Mr. Steele in full until such time as Mr. Steele can secure first-class passage back to San Francisco, *less any indebtedness that may be proved that Mr. Steele owes Mr. Blake.* * * * Mr. Steele's passage to San Francisco to be paid by the defendant." (R. 126-127.)

Two objections are made against the binding and conclusive effect of the award thus made by the arbitrator. The plaintiff argued and the trial court held that (a) the arbitrator did not decide the matters re-

ferred to him, but delegated his power in that respect to Mr. Ward in San Francisco, and (b) he left open the amount of the indebtedness of the plaintiff to the defendant.

The plaintiff's position, concurred in by the trial court, was that the award was void for the reasons just stated. We submit, however, that both of these objections to the award are without merit.

It must be admitted that the award is not phrased as satisfactorily or as conclusively as a judicial decision would be. This is a matter of regret. The award of the arbitrator is expressed colloquially in the language of a layman, but, if its meaning can be ascertained, it is entitled to an effect as conclusive as though phrased with meticolous art and judicial conclusiveness. We will deal briefly with the two matters which the arbitrator decided, and will endeavor to demonstrate that the award clearly shows that the objections of the plaintiff and of the trial court are unfounded.

The arbitrator determined "that the matter of the three-year contract should be referred to Mr. Ward in San Francisco for settlement". (R. 126-127.) It is urged that the arbitrator in the language just quoted refused to decide the plaintiff's claims against the defendant, based upon the three-year contract, but attempted to delegate his power of decision in respect to the same to Mr. Ward in San Francisco. We believe that this is a strained construction of the award. *The arbitrator was selected to decide the controversy.* It is highly improbable that any reasonable man selected

to decide a controversy between two others would attempt to delegate his power of decision to a third person. He was authorized by each of the parties to make the decision himself, and we submit that his award must be so construed, if possible, as to spell out of it a decision by the arbitrator rather than a delegation of the power to decide. We believe that so construed there is no difficulty at all in the matter. Bearing in mind that the three-year contract of May 27, 1918, was executed by American Trading Company (*Pacific Coast*), a corporation separate and distinct from the defendant; that this matter was urged by the defendant to the arbitrator (just as it was urged in the present action as a defense thereto); bearing in mind that the defendant was disclaiming *any* liability to the plaintiff *based upon the three-year contract*, for the reason that the defendant was not a party to that contract, the meaning of the arbitrator is clear. By deciding that "the matter of the three-year contract should be referred to Mr. Ward in San Francisco for settlement", all that the arbitrator meant was this:

"Mr. Steele has a three year contract executed in San Francisco between himself and American Trading Co. (*Pacific Coast*) through Louis A. Ward, its Vice President and Manager. I find that American Trading Co. (*Pacific Coast*) is a corporation separate and distinct from the defendant. Under these circumstances the plaintiff is without recourse against the defendant on the contract of May 27, 1918; he must look to the corporation with which he contracted, namely, the American Trading Co. (*Pacific Coast*), of which Mr. Ward is the Vice President and Manager. I therefore

find against the plaintiff in respect of his claim based on the three year contract, and decide that the only liability on that contract is the liability of the corporation *which really employed the plaintiff*—i. e., American Trading Co. (Pacific Coast), or Mr. L. A. Ward, its Vice President and Manager, to whom I refer the plaintiff.”

If the arbitrator had expressed his decision in the hypothetical language just quoted there would be no doubt of his meaning or the conclusiveness of his decision. The mere fact that the arbitrator’s language is more cryptic or less verbose is no reason why a different interpretation should be placed upon it than would be necessarily placed upon the language of the hypothetical decision. The arbitrator selected to decide the controversy of the parties decided that controversy *as between the parties before him* by holding that the plaintiff had no recourse against the defendant on the main contract, and that his only claim based on that contract was against the particular corporation that had employed him. We submit, therefore, that the first ground of the plaintiff’s objection to the award falls.

The second ground of attack upon the award of the arbitrator had to do with the deduction of “any indebtedness that may be proved that Mr. Steele owes Mr. Blake”. (R. 127.) In respect of this objection two facts will be noted: first, *it did not deal with liability under the three-year contract at all*, so that any objection to which it might give rise would pertain not to liability upon the three-year contract, but solely in respect of liability under the employment of the de-

fendant during what he styled the "Tokyo period". (R. 46.) We believe, however, that not even in respect of the latter period is the language of the arbitrator uncertain or inconclusive.

The arbitrator had before him the written statements of both the plaintiff and the defendant. The sole evidence submitted to the arbitrator was the written evidence incorporated in the record. The evidence so submitted upon the part of the defendant, as stated by the arbitrator, showed that there was a debit balance of Yen 541.21 due from the plaintiff to the defendant. (R. 126, 135.) The plaintiff's written statement of claim to the arbitrator showed a debit balance from the plaintiff to the defendant of Yen 545.21. (R. 59.) It will thus be seen that the only indebtedness from the plaintiff to the defendant spoken of by either of the parties was a debit balance asserted by the defendant to be Yen 541.21 and conceded by the plaintiff to be Yen 545.21. In other words, the plaintiff in his written statement of claim stated that he was indebted to the defendant in a sum exceeding by Yen 4 the sum in which the defendant contended that the plaintiff was indebted. No other indebtedness from the plaintiff to the defendant was claimed by the defendant or admitted by the plaintiff. The only difference between the parties, therefore, in respect of the plaintiff's indebtedness was a matter of Yen 4. In view of the fact that the fraction, i. e., .21, was the same in the statement of each of the parties, the arbitrator evidently believed that either the claim of the defendant was erroneous by Yen 4, or the computation of the plaintiff

was erroneous by the same amount. He evidently believed that a clerical error had been made in respect of the Yen 4, which in the settlement would be discovered, and he directs the defendant, therefore, to pay to the plaintiff a certain amount "less any indebtedness that may be proved that" the plaintiff owes the defendant. This indebtedness, however, was a matter admitted by the parties except to the extent of Yen 4, which upon the face of the evidence submitted to the arbitrator appeared to be the result of a mere clerical error made by one or the other of the parties. Under these circumstances, to hold that the arbitrator did not decide the matters submitted to him because he debited the plaintiff with the amount of an "indebtedness that may be proved" that he owed the defendant, in our opinion, savors of captiousness. It is quite evident from the evidence upon which the arbitrator decided the claims of the parties, that he failed to ascertain the exact amount which the plaintiff owed because of the uncertainty (arising in all probability from clerical misprision) as to whether the amount was Yen 545.21 or Yen 541.21. We submit, therefore, that it cannot in truth or in law be held that the award of the arbitrator is fatally uncertain because of his failure to ascertain and determine the amount which the plaintiff owed to the defendant.

It is the policy of the law to encourage litigants to adjust their differences by arbitration. In the case at bar the parties submitted their differences to an arbitrator. He heard all of the evidence which either party offered. He made an award which denied to the plain-

tiff any relief *against the defendant* in respect of the three-year contract of May 27, 1918. The asserted liability under the latter contract is the subject matter of the present suit. We submit that it is plain from the award of the arbitrator, read in the light of the facts attending the same and the evidence upon which the arbitrator acted, that he meant to assert in his award the principle that the plaintiff could not enforce the three-year contract against the defendant, because the latter had not executed that contract. This being so, we submit that the objections of the plaintiff to the arbitrator's award are untenable, and that the trial court erred in holding that such award was void and not binding upon the plaintiff.

V.

THE COURT ERRED IN HOLDING THAT THE MEASURE OF PLAINTIFF'S DAMAGE WAS COMPENSATION AT THE CONTRACT RATE FOR THE ENTIRE UNEXPIRED TERM OF THE CONTRACT, AND IN NOT LIMITING PLAINTIFF'S RECOVERY TO THE COMPENSATION WHICH HE WOULD HAVE EARNED UNDER THE CONTRACT UP TO THE TIME OF TRIAL.

The contract sued upon in the present case was executed on May 27, 1918, and provided for a three-year term to commence not later than July 1, 1918. The plaintiff was wrongfully discharged, according to the allegations of his complaint, on March 17, 1919. He continued, however, in the employment of the defendant at Tokyo until May 3, 1919. Plaintiff's action was commenced on July 3, 1919, at which time it will be

noted the contract had just two years to run. In awarding judgment to the plaintiff the court concluded that he was entitled to compensation at the contract price *for the entire unexpired term of the contract, and not merely for the period intervening between the date of his discharge and the date of the judgment* (R. 157). The court further held that the damages so awarded could not be mitigated by reason of any employment which the plaintiff might have secured in the interim, *for the reason that no employment offered him was of equal dignity with that contemplated by his contract with defendant, i .e., chief accountant*, and that plaintiff was not required to accept employment of a lower grade, because such fact, by demeaning the plaintiff, might injure his future earning power (R. 159). We shall discuss both of the questions involved in the court's decision, dealing first with the question of the measure of damages, and later with the question of mitigation.

A. The plaintiff's recovery should have been limited to the period of time intervening the date of his discharge and the date of the trial.

The proper measure of damages for the wrongful discharge of an employee has been the subject-matter of much dispute. The cases may be said to be in hopeless conflict upon the subject. The question has never been decided by this court; it has, however, been decided in this circuit.

In *Schroeder v. California Yukon Trading Co.*, 95 Fed. 296 (1898), decided by the *District Court* for the

Northern District of California, it was held that where a contract was wrongfully terminated and suit brought and trial had for the breach prior to the expiration of the contract term, the plaintiff's damages were limited to the contract compensation *up to the time of the trial*, less such sum as the plaintiff actually earned and received during that time, or might with reasonable diligence have earned by accepting employment of the same nature.

In *American China Development Co. v. Boyd*, 148 Fed. 258 (1906), decided in the Circuit Court for the Northern District of California, it was held that a plaintiff wrongfully discharged was entitled to prospective damages *covering the unexpired portion of the contract term subsequent to the date of trial*.

It remains then to consider which rule is supported by the greater weight of reason.

The general state of the authorities is well summarized by *Sutherland on Damages*, 3d ed. Vol. 3, sec. 692 (p. 2081). Speaking of an action for damages for wrongful discharge, the author says:

“* * * there will be a disadvantage in some states in its being brought before the expiration of the term of employment. The full damages for that term cannot be assessed in advance. This was strikingly illustrated in a Wisconsin case. The plaintiff had been employed at an annual salary of \$2,000 to act as superintendent of a lumbering establishment for five years. He was discharged at the end of the first year, and then brought suit to recover damages in respect to the remaining four years. He had found other employment for one year at a salary of \$1,000, and the trial having

taken place while he was performing this engagement, the trial court proceeded on the presumption, as a legal one, that the state of facts existing at the time of the trial would continue through the ensuing years to the end of the contract term, and a verdict for \$4,000 was found in favor of the plaintiff. This was set aside on appeal on the ground that there could be no such presumption. Cole, J., said: 'In any business the price of labor fluctuates greatly within four years; particularly is this true in the lumbering business in this country. Now suppose the respondent could only obtain for his services next year \$500, and so on, would it not be unjust to say that he should only recover according to the rule adopted by the jury in this case. Or suppose the value of the labor should rise to that he could obtain for his services \$2,000 or \$2,500 a year, what then would be his loss for the failure of the appellant to fulfill his contract? Still further difficulty presents itself. Suppose the respondent should die within the four years, or become incapacitated to perform service of any kind, would he be entitled to recover the damages he has recovered? * * * As the case now stands, we think he was only entitled to recover his salary on the contract down to the day of trial, deducting therefrom any wages which he might have received, or might reasonably have earned in the meantime.' "

The Wisconsin case quoted from is

Gordon v. Brewster, 7 Wis. 355 (1858).

The author then refers to the "strong and well supported dissent from this doctrine", treating the Wisconsin case as representing the prevailing doctrine.

Schroeder v. California Yukon Trading Co., 95 Fed. 296 (1898), *supra*, was a suit in admiralty to recover damages for the breach of contract of employment as

master of a vessel. Speaking of the amount of damages to which the libelant was entitled, Judge DeHaven said (p. 298):

“In my opinion, a sum equal to what would have been earned by him under his contract *up to the date of the trial* and the amount expended by him in returning to San Francisco, less what he has been paid by defendant and what he earned and received from other employment after his discharge from the service of defendant and before the trial of this action.”

In support of his conclusion the learned Judge cited *Gordon v. Brewster*, *supra*, the rule of which he declared to be “reasonable and just”.

See, also,

Darst v. Mathieson Alkali Works, 81 Fed. 284 (C. C. N. D. Va., 1896).

In this case the syllabus correctly states the conclusion of the court as follows:

“When suit is brought and trial is had before the expiration of the stipulated term of service to recover damages for a breach of contract by a wrongful discharge, *the recovery cannot be for the whole amount of salary for the entire term, but only for the amount thereof to the date of trial*, less such sum as plaintiff has earned, or might with reasonable diligence have earned, from the time of discharge to the time of trial.”

To the same effect as the foregoing cases, see

Sommer v. Conhaim, 25 Misc. 166, 54 N. Y. S. 146 (1898);

McMullen v. Dickenson Co., 60 Minn. 156, 62 N. W. 120 (1895);

Pape v. Lathrop, 18 Ind. App. 633, 46 N. E. 154 (1897);

Pacific Express Co. v. Walters, 42 Tex. Civ. App. 355, 93 S. W. 496 (1906);

Stein v. Kooperstein, 52 Misc. 481, 102 N. Y. S. 578 (1907);

Bassett v. French, 10 Misc. 672, 31 N. Y. S. 667 (1895).

The reasoning of the cases holding as above stated is based upon the proposition that where the employee's suit comes to trial before the expiration of the contract term it is impossible to determine with any degree of precision the amount of damages to which the plaintiff is entitled, *unless such damages be limited to the time of trial*. The future is subject to so many contingencies that to award prospective damages for a period subsequent to the trial, would, in many cases, penalize the defendant. The amount of the earnings of the plaintiff during the future period which should go in mitigation of the damages would be either impossible of ascertainment, or a matter very largely of conjecture. It may very well happen in the present case that the plaintiff, who has received a judgment for his contract compensation *for the entire unexpired term of his contract subsequent to his discharge*, without any diminution on account of moneys that the plaintiff may earn after the date of the judgment, will secure a position equally as good as that contemplated by his contract with the defendant, and will, in such event, be recovering practically a double salary during the period of such employment up to the end of the contract term. In all human probability the plaintiff will during the

two-year period to ensue after his discharge, to the end of the contract term secure a position equal in dignity and salary to that contemplated by his contract with defendant or, at least, will secure a position of dignity and monetary value. If he does so, moneys which he so earns, and which should go in diminution of defendant's liability, will not have been credited to the defendant.

In *Alaska Fish & Lumber Co. v. Chase*, 128 Fed. 886 (C. C. A. 9th, 1904), this court reversed a judgment in favor of plaintiff in a suit for wrongful discharge, for the reason that the court's instructions were such as precluded the jury from mitigating the damages to the extent of the money which the plaintiff might have earned if he had made any reasonable or bona fide effort to obtain other employment.

The plaintiff had the right to wait until the contract term had fully expired and then institute suit for his alleged wrongful discharge, in which event the measure of his damages would have been the loss suffered by him throughout the term of the contract subsequent to the date of his discharge. On the other hand, the plaintiff had the right to commence the suit immediately upon his discharge. We submit, however, that having elected to take the latter course, the plaintiff should be restricted in his damages to the loss suffered by him up to the time of trial, and that the court erred in allowing to the plaintiff prospective damages covering the period subsequent to the trial to the end of the contract term.

B. The court erred in making no allowance for the moneys which might have been earned by the plaintiff up to the time of the trial, or which might thereafter be earned during the unexpired portion of the contract term.

Upon the trial it developed that the plaintiff, since his discharge, had earned the sum of \$50 and no more. This sum was taken into account by the court in the judgment which it awarded the plaintiff. Plaintiff testified, in addition, that he had made numerous efforts to secure employment without success “for the reason that men of my [plaintiff’s] grade and capacity are not engaged out here” (in the Orient) (R. 252). The plaintiff further testified along this line as follows:

253):

“Q. What do you mean by that, men of your capacity?

A. Heads of departments are not engaged here by any firms of any standing.

Q. You mean they are sent out from home?

A. Yes, sir. People of my position, as chief accountants, are not employed here. I have letters to that effect. Standard Oil Co. told me that and Stevenson & Carlson, certified accountants, also told me. I had a letter from Mr. Stevenson—

Q. The last witness said the Asia Bank and the Grace China Co.—

A. I called in both these places and they didn’t want a man in my position and requirements. I would want at least \$500.00 a month. A position of book-keeping, yes. I could get many a position as book-keeper, but not as a chief accountant. Lots of positions as book-keepers are vacant here” (R. 253).

The court held that the plaintiff was not obliged to accept employment as a bookkeeper or any other *subordinate* position, for the reason that such employment

“would cause him to lose standing as an accountant” and affect seriously his own future career (R. 159). It appeared that the plaintiff was an accountant of more than twenty years’ experience, and his position was that at his age he did not think that he was called upon to “take any position less than chief accountant”; further, that no such position *was* available in the Orient, and *would not be* available, since all firms of consequence sent their chief accountants from their home offices. It is clear, then, that if the plaintiff remains in the Orient during the two years remaining of his contract term *he will not be able to secure a position as chief accountant*, and if not called upon to accept a position of lesser dignity the plaintiff will remain in idleness in the Orient during the remainder of his contract term without making any effort to mitigate the damages of the defendant. Plaintiff, of course, was not obliged to remain in the Orient. With his experience, if he went *elsewhere*, he could, in all probability, secure employment *as a chief accountant*. The plaintiff testified, however, that he had no plans to return to the United States after the conclusion of the trial; that he had not decided what he would do (R. 255).

The testimony of the plaintiff and the conclusion of the trial court give rise to two questions which may be stated as follows:

(1) Can a plaintiff, engaged as *chief accountant* for a defendant, upon his discharge by the defendant, refuse to accept any employment of lesser grade or dignity than that of *chief accountant*, when there are numerous other subordinate positions in the same general

line of activity, and particularly when he knows and asserts that *there never will be a position of chief accountant available?*

(2) If the plaintiff can, by returning to the United States, obtain a position of chief accountant which he could never obtain in the Orient, should the trial court have taken that fact into consideration in estimating the damages against the defendant?

As previously pointed out, this court in *Alaska Fish & Lumber Co. v. Chase*, 128 Fed. 886 (C. C. A. 9th, 1904), reversed a judgment in favor of plaintiff in a suit for wrongful discharge upon the ground that the court's instructions were such as precluded the jury from mitigating the damages of the defendant by the amount which the plaintiff might have earned in other employment, if he had made any reasonable or bona fide effort to secure such employment.

Keeping in mind that the suit in the present case was commenced *two years before the expiration of the three-year term specified in plaintiff's contract*, it is *inconceivable* that the plaintiff could not with reasonable diligence secure employment somewhere *as a chief accountant*, during the two-year period, and thus minimize the damage of the defendant. We submit, however, that the plaintiff was not entitled to remain in the Orient, where, according to his own testimony, there would be no opportunity of securing employment as a "chief accountant", and refuse to accept *any other employment* which would mitigate the damages of the defendant. The plaintiff's position and the court's con-

clusion was that plaintiff was not required to accept any subordinate position which, by demeaning the plaintiff, might injure his future earning capacity. We do not contend that the plaintiff was required to take any *menial* position. Furthermore, we concede that the plaintiff was entitled to take *a reasonable time* to secure a position as “chief accountant”, and that he could not, *for a reasonable time* after his discharge be required to take any position of lesser dignity than that of “chief accountant”. We contend, however, that when it became apparent to the plaintiff *that he could not secure a position as “chief accountant” in the Orient* he was required to accept *any other employment for which he was fitted*; he could not remain in idleness at the expense of the defendant. The true rule in our opinion is that expressed in

Kramer v. Wolf Cigar Stores Co., 99 Tex. 597,
91 S. W. 775 (1906).

This was a suit for wrongful termination of a contract. The plaintiff had been the manager of a cigar store in Texas for the defendant. Subsequently the store of which the plaintiff was manager was merged with another store, for which reason plaintiff’s contract was terminated. The defendant, however, offered the plaintiff employment in another store, *but in a subordinate position*. This the plaintiff declined to accept. Said the court (p. 777):

“The evidence indicates that plaintiff made no effort to secure any other employment after his discharge and before he went into business for himself, for the reason, as he states, that he knew that

the attempt to secure employment of the same character as that which he had of defendant would be useless, as there were none such open in Dallas."

The situation, therefore, was precisely the same as that in the case at bar. The plaintiff in the Texas case, was unable to secure other employment as manager of a cigar store *because there were no such positions available in Dallas*. In the case at bar the plaintiff could not secure a position as chief accountant in Shanghai because there were no such places available. Dealing with such a situation, the Texas court said (p. 777):

"If by reasonable diligence and within a reasonable time he could have secured another position of substantially the same character and grade as that which he had held with defendant, such amount as he could have earned therein during the entire term of service should be deducted from the contract price. If it is true, as he claims, that he could not thus have secured such a position, *and he knew that fact from the time of his discharge*, then, under the second rule laid down in the case referred to, it became his duty to use reasonable diligence to secure other employment for which he was fitted, and, in that case, the amount he should have earned in this way during the term of service should be the deduction."

The court cites in support of its conclusion the earlier case of

Simon v. Allen, 76 Tex. 399, 13 S. W. 296 (1890).

Upon the reversal of the case a second trial was had which resulted in a judgment in favor of the plaintiff for \$1076.50. The defendant appealed but the judgment was affirmed.

See:

Wolf Cigar Stores v. Kramer, 50 Tex. Civ. App. 411, 109 S. W. 990 (1908).

As appears from the opinion upon the second appeal, the plaintiff, after his discharge by defendant, was unable to secure employment "in a like or similar capacity to that in which he was employed by" the defendant as its manager. The plaintiff had had considerable experience as a bookkeeper, however, and after his discharge he could have secured employment as a bookkeeper at \$75 per month. He refused to accept such employment. The court in its opinion deals with the effect of plaintiff's opportunity to secure employment as a bookkeeper. Said the court (p. 994):

"A discharged employe cannot sit idly about during the contract period and recoup in damages, but the law imposes upon him certain obligations with reference to minimizing the damage that he has sustained: First, it becomes his duty to use reasonable diligence to secure another position of substantially the same character and grade as that which he had held with defendant. If within a reasonable time such a position cannot be secured, it then becomes his duty to use reasonable diligence to secure other employment for which he is fitted, and in either case the amount which he should have earned in this way during the term of service should be deducted from the damages resulting from the breach of the contract. The evidence shows that appellee could not have secured employment of the same character and grade as that he had with the appellant, because there was no opening for the same in Dallas. Appellee could have secured employment as a bookkeeper, for which position he was fitted, at a salary of \$75 per month. Had he remained idle during the remainder

of his contract period with appellant, this amount would have been the sum to be deducted from his recovery.”

See also

Texas Life Ins. Co. v. Roberts, 55 Tex. Civ. App. 217, 119 S. W. 926 (1909).

In the case at bar the plaintiff knew from the beginning that he could not secure a position as chief accountant in Shanghai. The reason he gave was that all concerns of any standing had their “chief accountants” and other heads of departments sent on from their home offices. Plaintiff therefore could not wait in Shanghai during the entire unexpired term of his contract, knowing full well that he could never secure a position as “chief accountant” there, and thus remain in idleness at the expense of the defendant. Inasmuch as the plaintiff knew from the time of the termination of his contract, or learned shortly thereafter, that he could not obtain a position as chief accountant in Shanghai, it was his duty, *if he intended to remain there*,

“to secure other employment for which he was fitted, and, in that case, the amount he should have earned in this way during the term of service should be the deduction”,

to which the defendant was entitled in mitigation of damages. Plaintiff admitted that there were numerous positions as *bookkeeper* available in Shanghai, and under the circumstances we submit that the defendant was entitled to a diminution of the damages to the extent of any moneys that the plaintiff might have earned as a bookkeeper in Shanghai during the un-

expired term of the contract. We are not here dealing with a case where a party was claiming a reasonable time within which to secure employment of the character and grade fixed in his contract. The plaintiff testifies that it would have been impossible *at any time* during the contract term to secure such employment, because places of such dignity were filled from the home offices of responsible concerns. Plaintiff, knew that it was impossible to secure employment of the character and grade specified in the contract and it became his duty "to secure other employment for which he was fitted", and thereby minimize the damage of the defendant. In holding that the plaintiff was not required so to do, we submit that the trial court erred.

In *Buffalo Bayou Co. v. Lorentz*, 177 S. W. 1183 (Tex. Civ. App. 1915), the syllabus, which is a true index to the holding of the opinion, reads as follows:

"A servant, wrongfully discharged, after a reasonable time has elapsed, during which he has endeavored to secure the same grade of employment, must accept such employment as he can obtain to mitigate damages."

The rule upon which the plaintiff and the trial court relied in the present case, and the limitation of that rule, are well stated in the opinion. Said the court (p. 1184):

"It is our opinion that the appellant had no right after Lorentz had been discharged from his position as captain to force him to accept a disrating and an inferior position at a lower salary than that provided for in his contract of employment; and, when he was offered such lower salary and inferior position he was under no obligation under his con-

tract to accept same in order to mitigate the damages. And, applying the rule thus laid down by Judge Henry in *Simon v. Allen*, supra, *he would have had a reasonable time to have sought other employment of the same grade before he would have had to accept a different or lower grade employment.* This time Lorentz did not have, for the offer of the different employment was made at the same time he was discharged. He testified that he did make an effort to get other employment and failed. The law does not contemplate that when a contract is broken the aggrieved party shall humiliate himself at once by accepting a lower grade of employment in this instance any more than in the case of the premiere danseuse, who, it was held, could not be forced under her contract of employment as a dancer in the first row, or leading lady, to accept a disrating where she would be placed in the rear rank of the ballet, thus concealing rather than displaying her charms. *Of course, after a reasonable time had elapsed during which an effort had been made to secure the same grade of employment, appellee would have been required to accept such employment as he could perform in order to mitigate the damages."*

We may concede then, that the plaintiff was not obligated to accept a position as bookkeeper in Shanghai or any other subordinate position until he had waited *a reasonable time* in an effort to secure a position of equal dignity to that specified in his contract, i. e., a position as "chief accountant" or head of a department. As soon as he learned, however, that it was fruitless to seek a position of equal dignity in Shanghai, because the heads of departments were always sent from the home offices of firms of standing, *it became the plaintiff's duty to accept any employment for which he was fitted.* Plaintiff knew by the time of the trial that he could

not remain in Shanghai and secure any employment of equal dignity to that specified in his contract. Under these circumstances he was obligated to secure other employment to which he was fitted,—a bookkeeping position or a position involving the same general duties,—and the defendant was entitled to a diminution of damages to the extent of the moneys that the plaintiff might have earned in such subordinate position for the balance of the contract term. In failing to make such a deduction we submit that the trial court erred.

If the plaintiff did not wish to remain in Shanghai and there accept a *subordinate* position when he could not obtain a position as “chief accountant”, he should have gone to some place where he could have obtained a position as chief accountant. With his qualifications there is no doubt but that if he had returned to the United States the plaintiff would have been able to obtain a position as “chief accountant”. Under these circumstances he was not entitled to remain in Shanghai, where there was no possibility of obtaining a position of like or commensurate dignity, and where he refused to accept a subordinate position. Plaintiff was not entitled to capitalize his dignity at the expense of the defendant. He was required to accept a subordinate position in Shanghai (when he found he could not there obtain a more dignified position) or to go elsewhere where he could secure a position befitting his dignity and attainments.

VI.

THE COURT ERRED IN FAILING TO DEDUCT FROM THE AMOUNT OF THE JUDGMENT THE ITEM OF \$507 (MEX.), ADMITTEDLY DUE FROM THE PLAINTIFF TO THE DEFENDANT.

The judgment in favor of the plaintiff did not take into account the sum of \$507 (Mex.) admittedly due from the plaintiff to the defendant. The failure of the court so to do is the subject-matter of Assignment of Error Number Sixteen, at page 30 *supra*. That this sum is admittedly due from the plaintiff to defendant appears from the statement of account prepared by the plaintiff appearing in the record at pages 57 and 58. In the deductions there listed is an item of debit yen 545.21 (amounting to Mex. \$507). This amount, admittedly due from the plaintiff to the defendant, of course, should have been deducted from the amount awarded to the plaintiff. The judgment in failing to make the deduction is to that extent erroneous.

CONCLUSION.

For the many reasons hereinbefore set forth, we respectfully submit that the judgment of the trial court should be reversed.

Dated, February 11, 1921.

Respectfully submitted,
FLEMING, DAVIES & BRYAN,
GARRET W. McENERNEY,

Attorneys for Plaintiff in Error.

(APPENDIX FOLLOWS.)

Appendix.

APPENDIX.

In the United States Court for China

United States ex rel.,

vs.

Paul McCrae, Acting Clerk of the United States
Court for China,

Respondent.

(Cause No. 586; filed June 9, 1917.)

LOBINGIER, J.:

This is an application for a writ of *mandamus* to compel the Acting Clerk of this Court to file and record certain articles of a proposed corporation "to carry on the business of banking in all its branches" and for various other objects therein declared. The articles are tendered under the Act of Congress¹ of March 2, 1904, and the respondent alleges that this "is not now in force and effect within the jurisdiction of the United States Court for China". It is conceded that said Act was once in force here, but it is contended that because Congress, about a decade later, in organizing the territory of Alaska, provided that

"all laws in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature,"²

1. 32 U. S. Stats. at Large, Ch. 978, pp. 947-952.

2. Act of Aug. 24, 1912, 37 U. S. Stats. at Large, Pt. I, Ch. 387, sec. 3.

and because said legislature did enact a new corporation law effective January 2, 1914, the Act of March 2, 1903, thereby ceased to be operative in China.

We have not at hand an official copy of the territorial statute just mentioned and the copy furnished³ fails to disclose a repealing clause. For aught that appears the said statute may be merely cumulative to the Act of Congress of 1903, just as the latter was itself cumulative to the corporation laws of Oregon which had previously been extended to Alaska and which, it was held,⁴ continued in force despite the corporate legislation of Congress above referred to.

But, assuming that the legislature of Alaska *did* attempt to repeal the Act of Congress of March 2, 1903, we are of the opinion that such attempt was ineffectual so far as this jurisdiction is concerned. For in the first place the Federal Constitution⁵ provides that "all legislative powers herein granted shall be vested in a Congress", and the courts hold that power so vested cannot be delegated to another body.⁶ This attempt to confer on a territorial legislature the power to repeal Acts of Congress is a recent departure, never having been made, so far as we are able to ascertain, except in this organic act of Alaska and in the more recent statute extending local self government to the Philippines.⁷ It is a departure which has not yet been sanc-

3. Synopsis of Laws (1916) 20-22.

4. *Alaska Gold Mining Co. v. Ebner*, 2 Alaska, 611.

5. Art. I, sec. 1.

6. *Am. & Eng. Ency. of Law* (2nd ed.) VI, 1028; *Cyc.* VIII, 830 and cases there cited.

7. Act of August 29, 1916, 39 U. S. Stats. at Large (1915-1919), Ch. 416, secs. 6, 7, p. 547.

tioned by any judicial decision, which we have found, while it is contrary to the doctrine noted above and supported by numerous authorities.

But even were it permissible to delegate to a territorial legislature the power to repeal Acts of Congress for the former's own territory, this would afford no precedent for the contention here made. For if respondent's position as to this point were correct we would have the strange anomaly of Congress delegating to a territorial legislature the power not only to repeal congressional enactments operative in its own territory but also to legislate for residents of a distant region like China. This would amount to a legal and political monstrosity.

Nor is this a case where a law was passed with a provision that it should remain in force for a limited period only. The Act of Congress of March 2, 1903, contains no such provision; its duration was as unlimited as any other law. It is true that another act, passed nearly a decade later, provided that all such laws were to "continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature". But this was not a repeal nor a grant of authority to repeal and it would not become effective, even as a limitation, without a delegation⁸ of legislative power, which as we have seen, is contrary to elementary principles.

8. As in the Act last cited which provides:

"That the legislative authority herein provided shall have power, when not inconsistent with this Act, by due enactment to amend, alter, modify, or repeal any law, civil or criminal, continued in force by this Act as it may from time to time see fit." (Sec. 7.)

The practice of extending over one jurisdiction laws originally passed for another, is not new in American jurisprudence. As early as 1790 the laws of Maryland and Virginia were continued in force over the respective portions of the District of Columbia which had been ceded by those states.⁹ This was renewed¹⁰ in 1801 and much of the old Maryland statute law remains in force in said District to this day as a result of such extension. In 1825 Congress extended the criminal laws of each state over all Federal territory and property located within its boundaries,¹¹ thus making a violation of such state law "an offense against the United States".¹² The same method was not infrequently employed during the formative period of western America when new territories were created. Thus the laws of Iowa were extended over the newly formed territory of Nebraska in 1855, while in 1884, the laws of Oregon were, as we have seen, extended over Alaska. In 1890 the Nebraska laws were extended over Oklahoma¹³ organized in 1889, while the same act extended over the Indian Territory "certain general laws of * * * Arkansas * * * not locally inapplicable or in conflict with this act or with any law of Congress".¹⁴ etc. These are but a few of many similar instances.

9. 1 U. S. Stats. at Large, 130.

10. 2 U. S. Stats. at Large, Ch. 15, p. 103.

11. 3 U. S. Stats. at Large, Ch. LXV, sec. 3.

12. *Biddle v. U. S.*, 156 Fed. 759, 763.

13. Act of Congress of May 2, 1890, 26 U. S. Stats. at Large, Ch. 182, sec. 11.

14. Act of Congress of May 2, 1890, 26 U. S. Stats. at Large, Ch. 182, sec. 31. These laws were treated as Acts of Congress equally as if they had been enacted by it *in haec verba*. In re Grayson, 3 Indian Ter., 497 (1901).

Congress was both following and making precedent, therefore, in enacting, as it did in 1848, that

*“the laws of the United States, are hereby, so far as is necessary to execute said treaty, extended over all citizens of the United States in China (and over all others to the extent that the terms of the treaty justify or require), so far as such laws are suitable to carry said treaty into effect.”*¹⁵

In 1860 a more elaborate act¹⁶ was passed in which the foregoing section was, almost literally, repeated, so that it affords the basis of American jurisprudence in China.

II.

Nor was the phrase “laws of the United States” a new one in our jurisprudence. It appears in the Federal Constitution (Art. VI) and as there used was construed by Chief Justice Marshall, as early as 1821, to include an act relating to the District of Columbia alone. In rejecting the contrary contention, that great jurist said:

*“Those who contend that acts of Congress, made in pursuance of this power, do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, as the legislature of the Union, is not a law of the United States, and does not bind them.”*¹⁷

15. Act of Congress of August 11, 1848, 9 U. S. Stats. at Large, 276, sec. 4. “The law was passed in reference to this treaty and to that with the Ottoman Porte.” *Dainese v. Hale*, 91 U. S. 13, 23 Law ed. 190.

16. 12 U. S. Stats. at Large, 73, sec. 4.

17. *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 424, 425, 5 Law. ed. 257.

In construing the statute¹⁸ regulating appeals from the Philippines, the Supreme Court declared the Philippine Tariff Act, which applied to the archipelago alone, “a statute of the United States.”¹⁹

It is true that the phrase “law of the United States”, as used in one paragraph of section 250 of the Judicial Code relating to appeals has been construed as not including an Act of Congress for the extension of New York Avenue in Washington.²⁰ But the *ratio decidendi* was the declared purpose of the paragraph to *limit* appeals.²¹ And it was conceded that the same phrase in another paragraph might be construed differently.²²

In reviewing a prosecution originally brought in the United States Court for China, and in upholding that Court’s jurisdiction of such a crime, the Court of Appeals for the ninth judicial circuit said:

“It is true, there is no general statute applicable to every state in the Union, making this an offense against the United States; nor could there be, in view of the fact that under our system of

18. 36 U. S. Stats. at Large, Ch. 1369, sec. 10.

19. *Gsell v. Insular Collector*, 238 U. S. 93, affirming 24 Philippine, 369, which in turn affirmed the decision of Lobingier, J., reported in *Philippine Law Review*, I, 229-233.

20. *American Security etc. Co. v. District of Columbia Comrs.*, 224 U. S. 491, 56 Law, ed. 856, 32 Sup. Ct. 353; *Washington etc. R. Co. v. Downey*, 236 U. S. 190, 59 Law, ed. 533, 35 Sup. Ct. 406; *American Surety Company v. American Fruit Products Company*, 238 U. S. 140, 59 Law, ed. 1238, 35 Sup. Ct. 828; *American Security etc. Co. v. Rudolph*, 38 App. Cas. (D. C.) 32.

21. *American Security etc. Co. v. District of Columbia Comrs.*, 224 U. S. 491, 56 Law, ed. 856, 32 Sup. Ct. 553.

22. “Of course there is no doubt that the special Act of Congress was in one sense a law of the United States. It well may be that it would fall within the meaning of the same words in the third clause of the same section; ‘Cases involving the constitutionality of any law of the United States.’” *Id.* Cf. *American Surety Company v. American Fruit Products Company*, 238 U. S. 140, 50 Law, ed. 533, 35 Sup. Ct. 408.

government the right to punish for such acts committed within the political jurisdiction of the state is reserved to the several states. But in legislating for territory over which the United States exercises exclusive legislative jurisdiction, Congress has made the act of obtaining money under false pretenses a crime. * * * In view of the legislation of Congress to which we have referred (the acts relating to Alaska and the District of Columbia, and the statute of July 7, 1898), our conclusion is that obtaining money or goods under false pretenses is an offense against the laws of the United States, within the meaning of the statute conferring jurisdiction upon the United States Court for China.”²³

This is the doctrine now regularly applied by this Court which has declared that the

“extension results quite independently of the original purpose of the acts themselves. Thus Congress may enact a law for a limited area under its exclusive jurisdiction, such as Alaska or the District of Columbia; by its terms it may have no force whatever outside of such area; but if it is ‘necessary to execute such treaties’ (with China) and ‘suitable to carry the same into effect’, it becomes operative here by virtue of the act of 1860 above quoted. Such we understand to be the doctrine announced by the Court of Appeals.”²⁴

In making such extensions Congress has expressly adopted the principle that an extension by it precludes abrogation by any other body. Thus in extending over Federal territory the laws of a particular state it was provided as early as 1866 that

23. *Biddle v. United States*, 156 Fed. 769, 762, 763.

24. *U. S. v. Allen*, U. S. Court for China, Crim. No. 66.

“no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States.”²⁵

A similar provision was embodied in an Act of 1898.²⁶ Nor would such express provisions appear necessary. On principle it would seem that since Congress alone may extend laws to China, it alone may withdraw them when so extended and that the act of a territorial legislature could have no effect on such laws.

III.

It is conceded, as we have seen, that the corporation act of Congress of March 2, 1903, was extended to China. But the questions involved are too important to rest upon a mere admission and we shall therefore inquire whether said act meets the requirements of the extending law above quoted—whether, in other words, it is one of the laws “necessary to execute the treaties” and “suitable to carry them into effect”.

Now one of the primary objects of the treaties was the promotion of commerce. That can hardly be accomplished in these days without corporations and a law authorizing their formation would seem to be one of the laws “necessary to execute the treaties”. Indeed the very desire of our citizens to incorporate in China affords the best evidence of such necessity.

Moreover this Act of March 2, 1903, is not only the latest expression of Congress on the subject of incor-

25. 14 U. S. Stats. at Large, Ch. 24, sec. 2; U. S. Rev. Stats., sec. 5391.

26. 30 U. S. Stats. at Large, Ch. 576, p. 717.

poration; it seems to us the most suitable. The legislation on that subject enacted for the District of Columbia is not only much older but seems to be confined mainly to special classes of corporations. The Act in question, however, appears to be an up to date general incorporation law. Neither the argument of this case nor a careful scrutiny of the Act itself has brought to light any feature of it which is unsuitable to conditions in China. It requires, it is true, a copy of the articles of incorporation to be filed "in the office of the Secretary of the District";²⁷ but in the case of extended legislation such provisions are to be construed not literally but as meaning the corresponding office, which, in China, would seem to be the Legation, since it is the only local American institution, besides this court, whose functions extend to the whole of China. In applying the Oregon statute, which required filing with the county clerk, the United States District Court for Alaska held that it would be sufficient to file with a similar official.

"Here, then, was the officer corresponding to the county clerk, with whom the other certificate might be filed. We are of the opinion, however, that a filing of the second certificate with the clerk of the court would have met the requirement, for it is well settled that the intention of the Legislature should not be defeated by a strict construction of the statute. * * * The intention of Congress is gathered, and by following out this obvious intention the person desiring to incorporate, while not filing with an actual Secretary of State and an actual county clerk, are substantially complying

27. Act of March 2, 1903, sec. 2.

with the law when they file with the surveyor general and the clerk of the court for the division in which they intend to carry on business.’²⁸

The chief copy, however, is required to be “filed in the office of the clerk of the District Court”²⁹ and to that designation the clerk of this Court well corresponds. The incorporation is thus effected by an officer of the Court and the concern placed under its observation from the start. Each year the corporation must file with the said Clerk a list of its officers and notice of any changes therein must likewise be filed.³⁰ The opportunities for official supervision are, therefore, much greater than in the case of corporations formed, as many have been, under the laws of some distant state, to do business in China where no official inspection on the ground is possible.

Moreover, the conditions both preliminary to, and after, incorporation are strict. The articles are required to state full particulars,³¹ all stock must be paid for “at its true money value”³² and “every stockholder shall be personally liable to the creditors of the company for the amount that remains unpaid upon the par value of his stock”.³³ The capital stock must not be increased nor diminished except as prescribed by law.³⁴ The corporation must “keep correct and complete books” which must “at all reasonable times,

28. *Alaska Gold Mining Co. v. Ebner*, 2 Alaska, 611, 614, 616.

29. Act of March 2, 1903, sec. 2.

30. *Id.* sec. 20.

31. *Id.* sec. 2.

32. *Id.* sec. 14.

33. *Id.*

34. *Id.* sec. 13.

be open to the inspection of stockholders’’,³⁵ and every year the principal officers must prepare and publish for three successive weeks in a newspaper of general circulation in the jurisdiction a sworn statement showing

“(1) the number of shares of capital stock outstanding; (2) the amount paid in on each share of stock; (3) the actual paid-up capital of the corporation; (4) the actual cash value of the property of the corporation and the character, location, and nature of the same; (5) the debts and liabilities of the corporation, and for what the same were incurred and whether the same are secured or unsecured and the amount of each kind, and, if secured, the character and kind of security; (6) the salaries severally paid each and every officer, manager and superintendent of the corporation during the preceding year; and (7) the increase or decrease, if any, of the stock, the capital, and the liabilities of the corporation during the preceding year.”³⁶

With the court officers ready to see that these requirements are observed the interests of both the public and the stockholders appear to be amply safeguarded. No defect or shortcoming has been pointed out in this statute, as compared with the most advanced corporation laws³⁷ and if Congress could, after long effort, be persuaded to enact another law, especially for this jurisdiction, it is not apparent wherein it would excel the present one. We are, therefore, of the opinion that the Act of March 2, 1903, is quite as “necessary” and “suitable” as the other “laws of the United States” which have been held by this and

35. *Id.* sec. 16.

36. *Id.* sec. 23.

37. *Cf.* the new Public Utilities Act of Illinois, discussed in *Illinois Law Rev.*, XII, 12.

other courts to have been extended here by the general act above quoted. For there can be no half way adoption of that doctrine; it includes all such laws or none. It cannot logically be restricted to any particular class of acts. It is just as applicable to civil laws as to criminal; just as "necessary" in respect to corporations as to procedure.

IV.

But the "suitability" of this Act of March 2, 1903, depends upon its requirements and applicants for incorporation thereunder must show compliance therewith so far as compliance is possible before incorporation. *Inter alia* the act requires the articles to state "the amount of capital stock of said corporation, and how the same shall be paid in".³⁸ The importance of this requirement becomes apparent when read in connection with the following:

"No corporation shall issue any of its stock, except in consideration of money, labor, or property estimated at its true money value."³⁹

The object of this is evidently to insure a *bona fide* capital at the start and to prevent incorporation with merely "watered" stock. Clearly this is a wise precaution whose observance must be strictly enforced.

Examining, in the light of this requirement, the Articles here tendered we find that the applicants have stated "the amount of capital stock" but not "how the same shall be paid in". It does not appear whether

38. Id. sec. 2.

39. Id. sec. 14.

the stock has been issued (and hence the capital created) “in consideration of money, labor or property” or of something else, nor whether, if the consideration is other than money, it is “estimated at its true money value”.

Moreover the articles fail to show whether the capital stock is to be paid in before incorporation or after. For aught that appears the concern might be incorporated without any tangible capital by merely issuing certificates of stock. In this case the applicants are worthy and reputable citizens and we may assume that no such result was intended. But as this is the first case where the question has arisen here we must adopt a rule which would apply to all situations and prevent incorporation by impecunious adventurers.

Again the Act provides that corporations organized thereunder

“shall have the right to acquire and hold only such real estate as may be necessary to carry on their corporate business.”⁴⁰

We are disposed to agree with respondent’s counsel that this provision is infringed by the recital, in the Articles, of the proposed corporation of an intention

“To take, own, hold, deal in, mortgage or otherwise lien, and to lease, sell, exchange, transfer, or in any manner whatever dispose of real property wherever situated.”

Now the Clerk is required to record articles only after they have been filed and the only articles which

40. Id. sec. 5.

are entitled to be filed are those which contain the particulars prescribed by the statute. Doubtless the act of filing is a ministerial rather than a judicial one, but the law seems to be well settled that the recording officer cannot be compelled by mandamus to accept for filing, papers which, on their face fail to comply with the statute.⁴¹ And since the recording of the articles perfects the corporate existence which can then be questioned only in a direct proceeding⁴² it seems to be not only the right, but the duty, of the officer to see that such existence does not commence until the conditions prescribed by the law have been fulfilled. In providing for incorporation thru the machinery of the Court, and imposing the responsibility upon its officers, the act which we are now applying seems to have been intended to prevent the evils of loose and reckless incorporation by making possible in advance a careful scrutiny and strict exaction of all prescribed conditions. This offers opportunities of supervision which would be lost if the recording officer were treated as a mere automaton, obliged to accept any corporate papers which might be presented.

Having reached a conclusion which disposes of the case before us we find it unnecessary to prolong this opinion by entering upon a consideration of the other question discussed in argument, viz., whether, under the law which we have found to be in force here, bank-

41. *State v. McGrath*, 92 Mo. 355, 5 S. W. 29; *Woodburg v. McClurg*, 98 Miss. 831, 29 S. W. 514; *People v. Nelson*, 3 Lans. (N. Y.) 394.

42. *Lord v. Bldg. Ass'n*, 37 Md. 320, 327; *Cochran v. Arnold*, 58 Pa. St. 399.

ing corporations may be organized. Since a determination of that question is not necessary in order to decide the pending cause whatever we might say thereon would be *obiter dicta* and we prefer to discuss it only when the necessity for adjudication arises.

For the reason that the proposed articles of incorporation do not, in our judgment, comply with the statute, the writ of *mandamus* is

Denied.

I hereby certify that the foregoing decision of United States ex rel v. Paul McRae is a true and correct copy of said decision filed with the clerk of the United States Court for China on June 9, 1917.

Witness my signature and the official seal of the United States Court for China on this the 24th day of September, 1920.

(Seal)

J. P. Connolly,
Clerk of the U. S. Court for China.

No. 3585

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN TRADING COMPANY

(a-corporation),

Plaintiff in Error,

VS.

A. T. STEELE,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

CHICKERING & GREGORY,

DONALD Y. LAMONT,

JERNIGAN, FESSENDEN & ROSE,

Attorneys for Defendant in Error.

FILED

FEB 26 1921

F. O. MONCKTON

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No. 3585

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN TRADING COMPANY

(a corporation),

Plaintiff in Error,

VS.

A. T. STEELE,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Inasmuch as counsel has adopted throughout his brief the use of the word "defendant" in referring to the plaintiff in error and the use of the word "plaintiff" in referring to the defendant in error, we shall, for the sake of clarity and consistency, likewise adopt these terms throughout our brief. We shall not at this point set forth at length the facts in the case. From pages one to five counsel has set for a resumé of these facts, and while this resumé contains certain conclusions of law, which will be at other points in this brief referred to, it is in the main a satisfactory statement of most of the facts in the case and we shall supplement it

from time to time with the facts upon which we particularly wish to dwell.

As we understand the brief for defendant, it raises six matters wherein it is alleged that the trial court was in error, and by reason of each of which it is claimed that the judgment of said trial court should be reversed. The propositions attempted to be made, as we understand them, are as follows:

1. That the defendant did not breach its contract with the plaintiff because it was authorized to discharge him whenever it considered his services unsatisfactory.

2. That by failing to deny in his replication that the services rendered by plaintiff were actually satisfactory and efficient, plaintiff must be deemed to have admitted that these services were both unsatisfactory and inefficient.

3. That the court erred in reserving certain rulings on objections to the admissibility of evidence.

4. That the decision of the arbitrator in the case was binding.

5. That the court erred with regard to the measure of damages.

6. That the sum of \$507 Mex. should be deducted from the amount of the judgment.

We shall take up these propositions in the order in which we have numbered them above, and dispose of each of them in turn.

We have also added to our brief an additional section, to wit, Section VII, which deals with our contention that this appeal should be dismissed for the reason that no motion for a new trial was made in the court below. We are filing, in addition to raising this defense in Section VII of this brief, a motion for the dismissal of this appeal. Authorities set forth in Section VII of this brief are to be deemed to be in support of said motion.

I.

THE DEFENDANT WAS NOT JUSTIFIED IN DECLARING ITS CONTRACT WITH PLAINTIFF TERMINATED BY REASON OF THE CLAIM THAT HIS SERVICES WERE NOT PERFORMED IN AN EFFICIENT AND SATISFACTORY WAY.

1. **The services of plaintiff, performed at Tokio, were not performed under a contract requiring them to be satisfactory.**

The original contract entered into between plaintiff and the American Trading Company (Pacific Coast) was as follows:

“San Francisco, Cal.
May 27, 1918.

Mr. A. Tilton Steele,
Present.

Dear Sir:

Confirming the writer's conversations with you during the past few days, we have employed you as follows:

Position: Chief Accountant of our Shanghai office, the duties of which office you are to take

up as quickly as possible, proceeding herefrom for Shanghai within about thirty days.

Duration of Employment: Three years from July 1st next or earlier if the time of your departure from San Francisco for Shanghai hereunder be earlier. Should you not leave San Francisco for Shanghai hereunder prior to July 1st, next, your salary will commence on July 1st.

Compensation: Two Hundred and Fifty (\$250.00) Dollars U. S. Gold per month for the first year and for the second and third year adjustments of salary to be made at the end of the first and second year, as may be mutually agreed; your compensation, however, not to be less than Ten Thousand (\$10,000.00) Dollars for the entire period of three (3) years.

Satisfactory Service: The undertakings herein contained on our part are all conditioned upon your doing your work in an efficient and satisfactory way.

Transportation to Shanghai: In addition to salary as herein provided, we will provide you with first-class transportation to Shanghai.

Bond: It is a condition of your employment that you give any bond the Company may require, the Company paying the premium thereon.

• Yours truly,
 AMERICAN TRADING COMPANY.
 (Pacific Coast.)
 (Sgd.) Louis A. Ward,
 Vice-President and Manager."

Upon August 27, 1918, plaintiff's journey from San Francisco to Shanghai having been interrupted at the request of the Tokio office, the following agreement was entered into between the American Trading Company and plaintiff:

“Tokyo, Aug. 27, 1918.

A. Tilton Steele, Esq.,

Present:

Dear Sir:

We beg to confirm our conversation of yesterday's date with reference to your temporary employment in this office.

Compensation: The compensation provided for in your original contract made with Mr. L. A. Ward, Vice-President and Manager of the American Trading Company of the Pacific Coast on May 27th calls for a salary of \$250.00 Gold per month, or a salary of not less than \$10,000.00 Gold for the three years' period of your contract. We have arranged that you are to receive \$250.00 Gold at exchange 50, which is the equivalent of Yen 500.00 per month together with an additional allowance of Yen 150.00 per month to cover any additional expenses which you may be put to owing to the change in your plans. The two items above mentioned will make a total of Yen 650.00 per month which you will receive while you are in the employ of our Tokyo office.

Term of Employment: As explained to you, we wish you to remain in Tokyo during the time that Mr. Boyd is absent on holiday which we estimate will be about six months. This time will, of course, apply on your three years' term as mentioned in your original contract.

Travelling Expenses: Any legitimate travelling expenses incurred by you on behalf of the company will be refunded to you.

General: It is understood between us that this temporary arrangement does not prejudice any verbal understanding which you may have had with Mr. Ward or with Mr. Burns prior to your departure from San Francisco.

We remain, Dear Sir,

Yours very truly,

AMERICAN TRADING COMPANY.

(Sgd.) D. H. Blake,

Vice-President.”

DHB-Q.

Inasmuch as the question of defendant's right to discharge the plaintiff in this case without other reason than the alleged unsatisfactoriness of his services, is one of the chief questions at issue upon this appeal, and inasmuch as there is no reference in the letter of August 27, 1918, to the satisfactoriness of any service, counsel strives to make it appear that this letter of August 27, 1918, is a mere modification of the original contract of May 27, 1918.

We do not believe that such is the legal effect of the letter of August 27, 1918. Instead of being a mere modification, it is an entirely separate and distinct agreement, standing wholly by itself and containing in itself all the terms necessary for its performance. We do not mean by such a construction to intimate that the letter of May 27, 1918, was in any way vitiated, or that the agreement contained in it was terminated by the letter of August 27th. The only effect of the later agreement upon the earlier one was to postpone the time when performance of the earlier one was to begin, without at the same time setting forward the time at which it was to terminate.

In support of such a construction we have the following circumstances: The agreement of May 27, 1918, is made between Mr. Steele and the American Trading Company (Pacific Coast), a corporation organized under the laws of the State of Maine. By it, plaintiff was bound to proceed at once to Shanghai, and there, for a period of three years, at

a monthly salary of \$250, and a total salary of \$10,000, fill the post of chief accountant, the service which he should render being "conditioned upon his doing his work in an efficient and satisfactory way". His transportation was to be paid to Shanghai, and he was to give a bond to the company.

The agreement of August 27, 1918, differs therefrom in almost every respect. It is an agreement entered into between the same Mr. Steele, but signed by a different corporation from the American Trading Company (Pacific Coast), to wit: the American Trading Company, a Virginia corporation. While it is true that these two corporations represent the same general international business enterprise, they were entirely distinct legal entities. Under this second agreement, Mr. Steele was employed at the Tokio office of the American Trading Company at a salary of 150 yen more than the \$250 Gold which he was to have received under the agreement of May 27, 1918. The term of the employment was an indefinite period which was estimated as being in the neighborhood of six months and which was to be terminated upon the return of Mr. Boyd from his vacation. He was allowed any legitimate traveling expenses, and a general clause was added stating, "this temporary arrangement does not prejudice any verbal understanding which you may have had with Mr. Ward or with Mr. Burns prior to your departure from San Francisco." It will thus be seen that the two agreements differ as to the parties signing the contract with Mr. Steele, the

compensation to be received by him, the place at which performance was to be made, the duration of the employment, and the fact that from the second agreement all reference both to satisfactoriness of service and to bond is omitted. We submit that the result of the making of the agreement of August 27, 1918, was not, as is contended by counsel, the entering into a mere amendment to the original agreement, but the making of a partial novation whereby plaintiff made a wholly new agreement signed by another party with the knowledge and with the tacit agreement of the party signing the original agreement that his original agreement should stand in abeyance pending the performance of the second contract. If there be any question as to the complete lack of a legal identity between the American Trading Company (Pacific Coast) and the American Trading Company, the defendant in this action, a glance at defendant's plea in abatement, found at page 4 of the record, and at the defendant's amended answer, found at page 22 of the record, is sufficient.

Of course the original agreement was ultimately that of the defendant corporation, but this was not apparent at the time the contract was made, and was so only on the principle of undisclosed agency. (Record p. 170.)

The four cases relied upon by counsel to establish that the letter of August 27, 1918, is merely an amendment or supplement do not control the case at bar. They establish the rule that a contract

with reference to the subject-matter of a former one does not necessarily supersede or destroy the obligations contained in the former, except in so far as the new one is inconsistent therewith. We have no quarrel with such a rule, and we are not asserting that by the making of the second agreement in this case the old one was destroyed or terminated. The only effect upon the original agreement was the modification of a single one of its terms, to-wit: the time at which actual service under it should commence. The second agreement not being with reference to the same subject-matter, it is clear that these authorities are not in point.

There is one statement, however, in defendant's brief which requires correction. It is said on page 42 thereof that "it" (referring to the agreement of August 27, 1918) "specifically provides that the services rendered under it should constitute services under the three year contract". There is, of course, no such provision in the letter of August 27, 1918.

What *is* said is, "This time" (referring to the estimated six months which would probably go by before the return of Mr. Boyd) "will, of course, apply on your three years' term as mentioned in your original contract." This is far from saying that services under the second contract will constitute services under the first. The time will apply in cutting down the period of service under the first, but the services will not be a performance of the first.

It is also to be noted that plaintiff might have been willing to contract expressly to render services satisfactory to the American Trading Company when he made his contract originally in San Francisco because he was dealing with Mr. Louis A. Ward, a man whom he had known for some time and whom he regarded as a personal friend, whereas he probably objected to binding himself to such a contract in Tokio. When the agreement of August 27, 1918, was made in Tokio, he was dealing with Mr. Blake, who was a stranger to him, and it may well be that he declined to permit any paragraph with regard to the satisfactoriness of the services to be inserted in the agreement.

- 2. Even though services rendered at Tokio were required to be rendered in an efficient and satisfactory way, defendant was not the sole judge of whether such services were satisfactory.**

Even though we should be held to be wrong in our construction of the agreement of August 27, 1918, as being a separate and independent contract, and even though this court should hold that the clause with regard to satisfactory service which was contained in the letter of May 27, 1918, controlled the activities of plaintiff while in the employ of the defendant at Tokio, nevertheless defendant could not be the sole and arbitrary judge of whether or not such services were actually satisfactory.

The numerous cases set forth in Section I of defendant's brief to the effect that where a contract

of employment requires services to be satisfactory to the defendant, he is the sole judge of their satisfactory nature, are examples of the citation of authority without the necessity of so doing. In practically every one of them the contract in suit expressly provided that *the services should be satisfactory to the employer*. Where there is such an express provision in the contract, there can be no dispute that the employer is the sole judge of the satisfactoriness of the services provided he acts in good faith. This is the doctrine in *Tiffany v. Pacific Sewer Pipe Co.*, 180 Cal. 700, and undoubtedly represents the vast weight of authority. The paragraph, however, with regard to satisfactory services contained in the letter of May 27, 1918, is not so phrased, the language there being,

“The undertakings herein contained on our part are all conditioned upon your doing your work in an efficient and satisfactory way.”

It is one thing to stipulate that work shall be done to the satisfaction of the employer. It is quite another to say that work shall be done in a satisfactory way. Where a contract provides that work should be done in a satisfactory way it means that it shall be done in a way which would be satisfactory in the judgment of a reasonable man. There are very few decisions in which this distinction has been even referred to, but we believe that it has been established in this state. The case of *Tiffany v. Pacific Sewer Pipe Co.*, *supra*, is most strongly relied upon by defendant in its

brief as being the latest decision in the jurisdiction where the contract in suit was made. We admit that the contract is to be construed in the light of California decisions.

However, there is an intimation in the Tiffany case to the effect that this doctrine applies only where the contract specifically provides that the “services shall be satisfactory to *the employer*” and that it does not apply where the contract simply provides that the services shall be satisfactory without stating to whom satisfaction shall be given. These words are found on page 705, where the court says:

“The terms of the contract imply that the defendant was not compelled to be satisfied if the quality produced equaled that which was being produced at the time the contract was made. The addition of the phrase ‘and satisfactory to the Pacific Sewer Pipe Company’ implied a complete satisfaction and authorized the defendant to reject the brick or discharge Tiffany under the terms of the contract if for any reason of any character the quality or quantity of the product was not satisfactory. We think the contract falls within the rule applicable to cases where the judgment of the promisor is involved, and that his decision that he is not satisfied is conclusive on the other party and upon the court to which the question is presented.”

The Tiffany case cites as authorities the cases of Parkside Realty Co. v. MacDonald, 166 Cal. 426; Allen v. Pockwitz, 103 Cal. 85, and Church v. Shanklin, 95 Cal. 626, in all of which cases it was

held that where real property is purchased subject to the owner giving a satisfactory title, if the memorandum requires that the title be satisfactory to the attorney of the buyer, this attorney's good faith in determining that it is not satisfactory is the only thing that is required. It is to be noted, however, that in *Allen v. Pockwitz* the case of *Winter v. Stock*, 29 Cal. 407, is referred to and distinguished, but by no means criticized. In it, the seller stipulated that he warranted an indisputable and satisfactory title or no sale. The court held that under such a memorandum the test of satisfaction was whether or not the title was legally valid. The ground upon which the *Winter* case was distinguished in *Allen v. Pockwitz* was, of course, that in the former case no one was named to whose satisfaction the title should be perfected, and this is the exact distinction between the contract of *Steele* with the American Trading Co. and the contract of *Tiffany* with the Sewer Pipe Co.

Cases from other jurisdictions which refer to this distinction between services satisfactory to the employer and services performed in a satisfactory way or manner, and which hold that in the latter case the element of reasonableness comes into the case, are:

Bridgeford v. Meagher (Ky.), 138 S. W. 75;
Ames v. Sniveley (Kansas), 96 Pac. 943;
Lord v. Industrial Dyeing, etc., Works
 (Pa.), 94 Atl. 573.

3. The failure of defendant to refer to and rely upon any dissatisfaction which it felt with plaintiff's services at the time of discharge is fatal to the defense that the services were actually unsatisfactory to it.

We agree with counsel that ordinarily it is not incumbent upon an employer to give all or any of the reasons for the discharge at the time that he terminates the contract of employment, and that, as a rule, he may at the trial rely upon any defenses which he may have had even though they were not stated previously; but in this case, where defendant is seeking to justify its action upon the ground that at the time of the discharge it was possessed of a certain state of mind, to wit, a dissatisfaction with the way in which plaintiff rendered his services, it was certainly incumbent upon it to express such dissatisfaction in order to avoid the appearance of bad faith, particularly when every circumstance attending the discharge pointed so very strongly in the same direction. Even if we are wrong in our contention that there was no term in the contract under which plaintiff rendered his services in Tokio which required him to render them in a satisfactory way, nevertheless defendant was required to exercise in good faith whatever right it had to determine whether or not the services were satisfactory. It could not discharge plaintiff for some business reason or reason of convenience, and then, in bad faith, rely upon a trumped-up claim that it was in reality dissatisfied.

We cannot conceive of a stronger combination of testimony pointing toward bad faith than the failure of defendant to express any dissatisfaction at the time of discharge and the writing of the letter of March 19, 1919, by Mr. Blake to Mr. Steele. This, taken in conjunction with the letter of the same date written by Mr. Blake to Mr. Ward, Vice-President of the American Trading Company (Pacific Coast), shows conclusively that at the time of the discharge Mr. Blake did not have at all in mind any dissatisfaction with plaintiff and was simply getting rid of him because of the fact that Mr. Manley, the accountant in the Shanghai office, had changed his mind and decided to stay in Shanghai, and that Mr. Boyd at the same time had given notice of his early return to Tokio from his vacation. These letters are found at pages 135 and 136 of the Record. We admire the boldness of counsel in referring to these letters at all in his brief, as we consider them the strongest possible evidence that the discharge of plaintiff was made in bad faith. The manner in which it is sought to escape the force of these letters is a claim that upon the face of the first of them there appears the hint that there had been a prior conversation and that in that conversation dissatisfaction had been expressed by defendant. In this connection there is in the brief the following excerpt from the letter to Mr. Steele:

“With reference to our conversation of a few days ago, we beg to confirm what we told you at that time to the effect,” etc.

This, it is contended, shows that the contract had been terminated, and had been terminated with the approval of plaintiff, and that at the time of the termination dissatisfaction had been expressed. When the whole paragraph from which the above excerpt is taken is read, no such hint can be gained. The paragraph proceeds as follows:

“* * * that we had received word from Mr. Burns, agent of our Shanghai office, that as he had made satisfactory arrangements with Mr. Manley to remain with the company, he did not want you to come to Shanghai.”

The completed paragraph shows simply that the conversation therein referred to was a conversation in which Mr. Blake intimated that Mr. Manley would stay in Shanghai and that they would have no place for Mr. Steele there. As to the letter of March 19, 1919, the trial court well says in its opinion that inasmuch as it was one from an executive officer of the American Trading Company to an executive officer of the American Trading Company (Pacific Coast), he might well speak without reservation. Yet there is not a hint of any dissatisfaction with the services rendered by the plaintiff. The fact that a copy of the letter was given to Mr. Steele does not affect the situation. If Mr. Blake had really had any dissatisfaction to express, he would have expressed it, and then either failed to show this letter to Mr. Steele or have written a separate letter for Mr. Ward's own perusal in case he did not wish to let Mr. Steele know of

his dissatisfaction. Just why defendant should desire to be so tactful and so solicitous of the feelings of plaintiff, it is hard to understand. Defendant was entirely willing to transport him to the Orient, and then to cast him adrift after less than a year's service without making any satisfactory arrangements for his return or for his compensation, but it was too kind-hearted to tell him that it was not satisfied with the manner in which he did his work.

The situation is much the same as that which existed in the case of *Delano v. Columbia Co.*, 166 N. Y. Supp. 103, a case relied upon by defendant in another connection. In this case plaintiff was employed as an inventor and expert mechanic in the production of ignition and starting devices for automobiles. Shortly after his employment had begun, the defendant company became interested in the munitions business and lost its interest in ignition propositions. As the work of the defendant company turned more and more toward munitions, its automobile device business so dwindled that there was soon very little use for plaintiff's services, and he was discharged. The contract of employment had a clause in it which provided that he might be discharged in case defendant should be dissatisfied with the employee. The court said:

“This was peculiarly a case for applying the rule, settled in this court, that while the employer has an absolute right to discharge the employe for dissatisfaction, upon such conflicting evidence, as above outlined, and the infer-

ences that may be drawn therefrom, a question of fact is presented to the court as to whether the dissatisfaction was genuine or feigned. *Beck v. Only Skirt Co.*, 176 App. Div. 867, 163 N. Y. Supp. 786; *Diamond v. Mendelsohn*, 156 App. Div. 636, 141 N. Y. Supp. 775. See, also, *Zahler v. Mann*, 97 Misc. Rep. 19, 160 N. Y. Supp. 1085. The appellant's main exception is to the court's refusal to dismiss the complaint on the theory that the right to discharge was arbitrary, and no question of whether the reason assigned was genuine or not should have been submitted to the jury. But, upon the authorities referred to, the genuineness of the alleged dissatisfaction was a question of fact."

The same question of fact existed in the case at bar; that is to say, even though defendant had the right of discharge if dissatisfied, did it, or did it not, terminate the employment because it actually was dissatisfied, or because it was embarrassed by the possession of too many satisfactory accountants?

Even granting that there is direct testimony in the record that the company was dissatisfied with his services at the time of his discharge—which is a doubtful proposition—nevertheless there is very positive testimony contained in the correspondence tending to show that it did not discharge him by reason of any dissatisfaction at all, but simply because it did not need the services of another accountant. There are no findings by the court in the case, and therefore the judgment entered by the trial court amounts to a general finding in fa-

vor of the plaintiff, which must be sustained if possible. It may well be argued that there having been a conflict of testimony on the issue of whether or not the American Trading Company was in fact dissatisfied, the judgment will not be disturbed. Such a manner of sustaining the judgment is suggested in the most recent Federal case upon the subject of satisfactory services, to wit, the case of Computing Scale Co. v. Barnard Co., 259 Fec. 250. In that case the court reversed a judgment rendered in favor of the plaintiff who sued for a breach of a contract to manufacture a patented article and pay plaintiff a royalty provided that the patented article proved satisfactory. In so reversing the judgment, the court intimated that had there been any testimony whatsoever in the record to the effect that the defendant really was satisfied, instead of there being mere suspicious circumstances which might possibly point to such a conclusion, it would not have disturbed the judgment. In this connection the court said:

“We must approach this question recognizing that, since there was a general finding for plaintiff and since that finding would be sufficiently supported if the record contained evidence fairly tending to show that the Scale Company’s claim of dissatisfaction was made in bad faith and while it was in truth and in fact satisfied that the device would be a commercial success, the matter of law for us to decide is whether there was any substantial evidence to that effect; but we are neither embarrassed nor aided by the presence of any finding by the district judge on that question. He

was of opinion that actual effort to put upon the market was necessary before the Scale Company was at liberty to assert its failure to be satisfied with commercial success, and hence he considered the evidence only from the standpoint of the actual merits of the article, and not with reference to whether the company was really satisfied."

4. Services unsatisfactory at Tokio were not necessarily services unsatisfactory at Shanghai.

Again conceding for the sake of argument that defendant had the right to discharge plaintiff if in good faith dissatisfied, it is one thing to claim that whatever services he had rendered at Tokio were unsatisfactory, and it is quite another to contend this his services would be unsatisfactory in Shanghai if he were permitted to go to that city and attempt performance of his original agreement. This is a point upon which the trial court relied very strongly, and we believe that it is unescapable. Plaintiff agreed in San Francisco to go to Shanghai, and there to perform his services in a satisfactory way. He did not agree to perform them in a satisfactory way at Tokio or anywhere else. Even though it be assumed that the letter of August 27, 1918, carried, by implication, as one of its terms, a provision similar to the satisfactory service provision contained in the original agreement, nevertheless a failure on the part of plaintiff to perform such satisfactory services at Tokio could not have precluded him from an attempt at such performance at Shanghai. The different

surroundings, locations, business associates, and particularly office personnel, might have had a decided bearing on the nature of the services rendered. It was therefore, in any case, the right of plaintiff to be given a trial at Shanghai.

5. In this case, defendant was not justified in relying upon alleged delinquencies or shortcomings of plaintiff unless it was aware of their existence at the time of discharge.

While it is true that in general an employer is entitled to rely upon the shortcomings of his employee, whether these shortcomings were known to him and relied upon by him at the time of discharge or not, such is not the case where the contract provides that the services shall be to the satisfaction of the employer and the discharge is attempted to be justified upon the theory of the lack of such satisfaction. We have no cases to cite in this connection, but it is obvious that the general rule would not apply under such circumstances. Where an employer seeks to justify the discharge on the ground of dissatisfaction, it is absurd for him to assert that he may rely upon misconduct of which he was not aware at the time of the discharge. Inasmuch as the employer's state of mind is, under such circumstances, the only thing to be looked to, facts which are not known at the time to the employer can certainly have no bearing upon the state of mind in question.

We do not believe that any of the cases relied upon by counsel go so far as to assert such a prop-

osition, and if any of them may be so construed, we are certain that the court will not follow such an obvious illogicality.

In connection with this question of the state of mind of the employer at the time of the discharge, it is a significant fact that the actual date upon which Mr. Steele was notified that his services would not be required in Shanghai at all, and would not be required in Tokio after the return of Mr. Boyd from his vacation, was as early as March 19, 1919, and that he remained in the service of the defendant in its Tokio office, in the capacity of chief accountant, until the actual return of Mr. Boyd about the 1st day of May of that year. It is apparent, therefore, that there was a period in the employment of Mr. Steele at Tokio of about six weeks, during which he was aware that he had been wrongfully discharged from employment, during which he became increasingly more certain that nothing satisfactory would be done with regard to the settlement of his claim, and during which he nevertheless continued to occupy his position of responsibility and authority with the defendant. Is it surprising that, during such a period and under such circumstances, friction should develop between the defendant and the employee? It is very surprising, indeed, that actual hard feeling did not develop sooner than it did. It is a fact that, according to the testimony of Mr. Steele, he had no actual hard words with Mr. Blake himself until the 30th of April. A careful reading of the record, par-

ticularly with reference to plaintiff's "Exhibit H", containing a careful resumé of Mr. Steele's activities in Tokio on behalf of the defendant company, shows clearly that whatever irritation arose, and whatever minor infractions of strict rules plaintiff was guilty of, occurred during this period subsequent to March 19, 1919. Such a situation more than lends color to the theory which we have before expressed, that any dissatisfaction claimed by defendant to have existed even in its own mind was wholly an afterthought and an outgrowth of the discharge of defendant rather than something which actually existed at the time the discharge took place. An attempt has been made to distort this situation into an agreement on the part of Mr. Steele to a cancellation of his contract. As we have already pointed out, the record supports no such contention. It is true, as stated by Mr. Blake in his letter of March 19, 1919, to Mr. Ward, that plaintiff "was quite willing to come to a friendly understanding with the American Trading Company." There is not, however, in such words the slightest intimation that he was willing to drop any claim that he had against them for wrongful and unjustifiable discharge from their employ. His willingness to come to a friendly understanding with them was simply the willingness of any person whose services had become unnecessary to his employer, to accept, in lieu of the performance of his contract, another employment or a payment in money. It is quite apparent that on March 19,

1919, Mr. Steele did cherish some such illusions with regard to an amicable settlement, and it was the gradual destruction of these illusions which developed whatever of ill feeling is shown to exist between himself and the Tokio office of the defendant.

6. The record discloses no real justification for dissatisfaction.

If the trial court was correct in its assumption that the clause contained in the agreement of May 27, 1918, was not carried over into the agreement of August 27, 1918, one of the issues in the trial of the case at bar was whether or not there actually existed the reasonable ground for dissatisfaction required of defendant with the service of the plaintiff. We concede that there is possibly in the record some testimony with regard to trifling infractions of rules by plaintiff. The general finding of the trial court, however, having been in favor of the plaintiff, and there having been a conflict of evidence on this point, such a finding is conclusive.

We will, however, for the purpose of showing how little counsel was able to prove any real ground for dissatisfaction, refer to these alleged infractions. Complaint is made that plaintiff was sometimes late in reaching the office, on several occasions getting there at 9:30 a. m., when, according to office rule, the office opened at 9:00. In this connection it must be borne in mind, as the trial court said, that plaintiff was not a mere clerk, and had the right to use some discretion with regard to time of

arrival if he did his work satisfactorily. There is also in evidence the uncontradicted testimony of Mr. Steele to the effect that although the office rules allowed the interval from 12:15 to 1:30 for lunch, he never took any time out for lunch at all, and that he always remained at the office until six o'clock instead of quitting his post at 5:00 p. m., as he was entitled to do. (See Record, page 47.) It is further contended that he made himself objectionable in his criticism of the business methods employed in the Tokio office. When it is realized that such criticisms were, most of them, made subsequent to his notification of discharge, and were confined wholly to the manner in which the auditing or financial end of the business was conducted, and were, furthermore, aimed at obsolete methods condemned by the auditors of the company (see Record, page 64),—such an objection to Mr. Steele's services carries no weight at all. Lastly, great emphasis is laid upon the fact that he wrote to Mr. Louis A. Ward, in San Francisco, certain letters, criticising the manner in which the finances of the Tokio office were handled and audited. This, according to Mr. Blake and according to the brief of defendant, constituted treachery on his part to the organization which employed him. Had these letters been addressed to a person entirely unconnected with the American Trading Company, such an objection might be well founded. It must be remembered in this connection, however, that Mr. Steele was originally employed by Mr. Louis A.

Ward, the Vice-President and General Manager of the American Trading Company (Pacific Coast), and at the time the former wrote these letters he believed Mr. Ward to be a superior officer in the same company in which Mr. Blake was an officer and of which the Tokio office was a part. He did not at that time know that, as a matter of law, the two corporations were distinct. Mr. Blake himself admits that Mr. Steele informed him that he was writing some such letters to Mr. Ward, but he did not state the exact nature of them (see Record, page 119). Not only this, but the two letters most objected to, namely: those of April 17th and 24th, 1919, were both written a month subsequent to plaintiff's notification of discharge, and therefore could have no bearing either upon the satisfactoriness of his service prior to the date of his discharge or on the state of mind of the employer at the time the discharge was made.



II.

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS WAS PROPERLY DENIED FOR THE REASON THAT NO REPLICATION WAS NECESSARY IN THIS CASE.

1. Neither under the common law nor under the Alaska code was a replication required where the pleadings were such as existed in this case.

It is contended that plaintiff, by failing to deny in his replication the allegation contained in the answer to the effect that the alleged services ren-

dered by him had been neither satisfactory nor efficient as required by the contract, admitted that his services were unsatisfactory and inefficient. It is upon this ground that plaintiff's motion for a judgment on the pleadings was urged. An effort is made in the brief of defendant to show that, under the rules of procedure existing in the United States Court for China, such a denial in the replication was essential. This view is predicated upon the assumption that either the Alaska code or the common law rules with regard to replications applied to pleadings in the court below. Assuming for a moment, for the sake of argument, that the common law rule and the provision of the Alaska code in this regard do apply, nevertheless we maintain that, under the pleadings as they were constituted by the complaint and the answer in this case, no denial of the alleged unsatisfactoriness of services was necessary at all.

The complaint alleged that defendant "wrongfully, improperly and without cause or reason, on or about March 17, 1919, dismissed and discharged the plaintiff" and thereby breached the agreement of May 27, 1918, a copy of which was attached to the complaint as an exhibit.

The amended answer of the defendant contained as paragraph 10 the following:

"10. That the alleged services rendered by the plaintiff herein to the defendant were neither satisfactory nor efficient, as required in the contract alleged in plaintiff's petition,

a copy of which is attached thereto and marked Exhibit A, and that the said plaintiff in the performance of his alleged duties was inefficient, negligent and insubordinate to his superiors.”

Though a replication was filed by plaintiff, there was in it no denial that his services had been unsatisfactory or inefficient.

Granting for a moment that the Alaska code controls the pleadings in this case, no replication was necessary where the complaint and the answer stood as they stand in the case at bar. Section 69 of that code, upon which counsel relies, is as follows:

“Sec. 69. If the answer contain a statement of new matter, constituting a defense or counterclaim, and the plaintiff fail to reply or demur thereto within the time prescribed by law or rule of the court, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it he may have a jury called to assess the damages.” (31 St. at L. 343.)

The question then arises, Is the allegation contained in the amended answer to the effect that the services of plaintiff were neither satisfactory nor efficient as required in the contract, new matter constituting a defense or counterclaim as the words are used in Sections 69 of the Alaska code? We submit that they are not, for the reason that the complaint, in relying upon a breach of contract in this case and in alleging that the discharge was wrongful, improper and without cause or reason,

virtually anticipated the defense that the services were unsatisfactory or inefficient, and therefore the allegation in the answer to the effect that these services were not satisfactory or efficient constituted a denial, couched in a slightly different phraseology, of the exact allegation of the complaint. It is well settled that it is not necessary to deny in a replication such allegations of an answer.

Fortunately, we have a decision of the Federal District Court for Oregon which passes upon an Oregon statute which has practically the same provision as Section 69 of the Alaska code above quoted; in fact, it is probable, as is hinted in defendant's brief, that the Alaska code was copied from the Oregon code. This provision of the Oregon code is set forth in the case above referred to, to wit, *Watkins v. Southern Pacific R. R. Co.*, 38 Fed. 711, as follows:

“‘If the answer contain a statement of new matter, constituting a defense, and the plaintiff fails to reply thereto, the defendant may move the court for such judgment as he is entitled to on the pleadings’.”

In the *Watkins* case, a complaint, based upon personal injuries by reason of the defendant's negligence, alleged that the injury occurred through no fault or negligence of plaintiff. Defendant's answer denied that through no fault or negligence of plaintiff plaintiff was injured as alleged in the complaint. The answer contained a further alle-

gation that defendant had used due care and diligence in the matter complained of and that the alleged injury was not caused by the negligence of the defendant, but was wholly due to the fault and negligence of plaintiff himself. This additional allegation in the answer was, in effect, therefore, a defense based upon contributory negligence, which defense was, of course, anticipated in the complaint by the allegation that the injury had occurred through no fault or negligence of plaintiff. No reply was made to this so-called defense, and thereupon the defendant moved for a judgment on the pleadings. In denying such a motion the court said (p. 713):

“But the plaintiff having chosen to allege in his complaint that the injury occurred without fault or negligence on his part, and the defendant having chosen to meet this allegation with a specific denial of the same, there is an issue of fact formed on this question which must be tried as such before a judgment can be given in the case.

The statute in authorizing a judgment on the pleadings in case no reply is made to a defense, presupposes that the facts constituting such defense are not elsewhere stated or put in issue in the pleadings; in short, that they are ‘new matter’.”

The rule expressed in the Watkinds case represents that followed apparently in all jurisdictions where a replication is recognized as a pleading. It has been followed in Oklahoma in the case of *Muskogee Vitrified Brick Co. v. Napier* (Okla.),

126 Pac. 792, where the action was one of an employee personally injured while in the service of the defendant employer. In denying that a directed verdict should have been given in the case for the defendant, the court said:

“The first contention under this objection is without merit. The parties were at issue on all material matters. The plaintiff alleged that he had been ordered to oil the wheels while in motion; that he did so without any negligence upon his part. The defendant denied giving the order, and then alleged that plaintiff, in violation of its orders, was injured through his own negligence. This was merely a traverse of the allegations of the petition. The important thing was: Did he give the order, and was plaintiff negligent in obeying it?”

In *Ward v. Sturdivant* (Ark.), 132 S. W. 204, in an action brought to restrain a sheriff from executing a deed to land sold under execution, the court said:

“The affirmative allegations in the complaint in this case that the judgment was the property of the estate of Susan Jones were in effect denials of the averments made by appellants in the answer that Ward was the owner thereof by reason of a right of subrogation thereto. Such averments in the answer were matters of defense and required no reply. They were therefore not admitted, but required proof to sustain them. 18 Ency. Plead & Prac. 696; *Watson v. Johnson*, 33 Ark. 737; *George v. St. L. I. M. & S. R. Co.*, 34 Ark. 613; *St. Louis I. M. & S. R. Co. v. Higgins*, 44 Ark. 293.”

In *Dueber v. Wolfe* (Wash.), 92 Pac. 455, in an opinion in which Judge Rudkin concurred, it was held that in an action by a married woman to quiet title to a lot sold under execution, the plaintiff's motion for judgment on the pleadings was properly denied, the court saying:

“The next contention is that the court erred in refusing to grant the appellant's motion for judgment on the pleadings, for the reason that the respondent did not deny the affirmative allegations in the answer. These allegations were, in substance, that the debt for which the judgment was obtained was a community debt contracted for the support of the community, and that certain improvements had been put upon the property with community funds; but these averments tendered no new issue. They but tended to show that the property levied upon and sold was community property, a question already at issue by the allegations of the complaint and the denials contained in the answer.”

To the same effect are *Pott v. Hanson* (Minn.), 124 N. W. 17; *Persse v. Gaffney* (Colo.), 47 Pac. 293, and *Ermert v. Dietz* (Ky.), 44 S. W. 138.

It is thus clear that neither under the common law nor that codification of the common law principle with regard to replication found in the Alaska code was it necessary for a defendant to reply to such allegations as that found in the answer of defendant in this case with regard to the satisfactoriness of services. They were not new matter. That being the case, defendant was in no wise prejudiced by the state of the pleadings. It is apparent that

the plaintiff did not deny the allegations in question for the reason that he deemed them not to be new matter and therefore not requiring a denial. If defendant really was misled by this state of the pleadings, and honestly supposed that plaintiff had thereby admitted that the services were unsatisfactory—which, by the way, is something which we do not for a moment believe—it was misled by its failure properly to understand the nature of the pleading, and must abide the consequences.

It is further to be remembered that in considering the effect of the Alaska code, that the provision concerning a replication is not mandatory, but merely allows such a pleading to be filed, the words of the statute in Section 899 being as follows:

“The plaintiff may reply to such new matter.”

The same statute, Section 929, also provides

“The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party.”

2. **The allegation contained in the answer with regard to the unsatisfactory nature of the services was so vague as to require no replication.**

Even though a replication would ordinarily have been required in this case had the allegations contained in the answer with regard to the unsatisfactoriness of services been clear cut, nevertheless no

reply to the allegations contained in this particular amended answer was necessary because the allegations of said answer were so vague as to make it impossible to determine to what services they referred. The trial court, in its opinion in this case, was indeed right in saying that where a party relies upon such a technical rule as is here contended for by defendant with regard to its motion for a judgment on the pleadings, its own pleadings will be scrutinized with the minutest care.

3. **The long continued custom in the United States Court for China of the practice of deeming new matter contained in an answer to be denied, is so well established in that jurisdiction as to be controlling.**

As the trial court says in its opinion, replications to new matter contained in an answer have not been customary in that jurisdiction. This being the established custom in the court in which this case was tried, this court should certainly not go out of its way to reverse a judgment rendered in favor of one who had, in good faith, relied upon such practice. The case was indeed tried upon the theory that plaintiff did not admit that the services were either unsatisfactory or inefficient, and no one was prejudiced by the condition of the pleadings. In view of the fact that counsel for defendant agreed to withdraw their motion for an order taking depositions in consideration of the waiver by counsel for plaintiff of objections, on the ground of hearsay and the best evidence rule,

to the testimony of Mr. Burns, no prejudice can be claimed in this regard, nor can any deficiency in the proof of defendant's case be sheltered under such a cloak (see Record, page 168).

4. Neither the statutes of the United States nor the common law rule with regard to replications actually applies to the matter of such pleadings in the United States Court for China.

Under Subdivision 1 of this section of our brief, we assume for the sake of argument that the Alaska code and the common law rule with regard to replications applied to procedure in the United States Court for China. We do not, however, actually concede this to be the case. The statute conferring jurisdiction upon the consular courts is found at Section 4086 of Federal Statutes, Annotated, and is as follows:

“Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law

of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.”

As we construe that statute, the laws of the United States were extended to the territory covered by the treaties, with the proviso that where such laws were not adapted to the object, or were deficient, the common law, together with the law of equity and the law of admiralty, should be extended to such territory; and with the further proviso that if neither the common law nor the law of equity nor of admiralty, nor the statutes of the United States, were *appropriate and sufficient* remedies, the ministers to these countries should, by their decrees and regulations, set up rules of their own. The old consular regulations in effect before the passage of the statute creating the United States Court for China, are an example of the exercise of this power by the ministers in those countries. According to Section 5 of those Consular Rules, the two pleadings, and the only two pleadings, required, are a complaint and an answer. If the persons framing the consular proceedings had deemed a replication to be an “appropriate” pleading, doubtless it would have been included. By omitting it, while at the same time recognizing a complaint and an answer, these regulations definitely establish that a replication was not a necessary pleading in that jurisdiction.

When the United States Court for China was established, in 1906, a provision was made for the procedure to be followed in that court, as follows (5 Fed. Stat. Ann. 2nd Ed. 1104):

“Sec. 5. (PROCEDURE.) That the procedure of said court shall be in accordance, so far as practicable, with the existing procedure prescribed for consular courts in China, in accordance with the Revised Statutes of the United States; *Provided, however,* that the judge of the said United States Court for China shall have authority from time to time to modify and supplement said rules of procedure. The provisions of sections forty-one hundred and six and Forty-one hundred and seven of the Revised Statutes of the United States allowing consuls in certain cases to summon associates shall have no application to said court. (34 Stat. L. 816.)”

The section above quoted, in providing that the procedure of said court shall be in accordance, so far as practicable, with the existing procedure prescribed for consular courts in China, expressly made the old consular regulations a part of the procedure of such court. The proviso that the judge of the court should have authority from time to time to modify and supplement these rules of procedure, is of no importance in view of the fact that, so far as a replication is concerned, he has not done so.

We submit therefore, that the old consular regulations having altered the common law and statute law upon the subject of the need of replications, are controlling and binding upon the United States Court for China at the present time, and that there-

fore no replication at all was required to be filed in this case.

Our reasoning under this subsection of our brief follows the exact lines of the opinion of Judge Thayer of the United States Court for China in the case of *United States v. Charles A. Engelbracht*, 1 Ex. Ter. cases 169, a considerable portion of which opinion is found at Appendix A of this brief. In that case the defendant was proceeded against for the crime of embezzlement upon information filed more than three years after the commission of the crime. The accused filed a plea in bar relying on Section 1044 of the Revised Statutes of the United States which provides that a three-year limitation shall apply to such crimes. In holding that the plea in bar was not good, the court held that Section 82 of the Consular Court regulations prescribing a six-year period limitation for heinous crimes applied rather than Section 1044 of the Revised Statutes. In reaching this conclusion the court went upon the theory that neither the common law nor any statute of the United States was controlling over a rule of the United States Court for China after that court had been established on June 30, 1906, the procedure of the Consular Court regulations having been expressly adopted by said Act of June 30, 1906, at Section 5 thereof. The language of the court in this connection is in all respects a confirmation of our view already expressed above upon this subject, and is as follows:

“All the existing Regulations had been laid before Congress, as required by law, many years before this statute was passed, and it must be presumed, under well established doctrine, that Congress had full knowledge thereof. In fact, it appears to the Court that the provision referred to cannot be considered as anything less than an affirmative recognition and confirmation of such of these regulations, at least, as relate to procedure. Whether or not the act must be considered as recognizing and confirming the whole body of these regulations existing at the date of the passage of this act, the court does not at this time undertake to say. It is proper to note, however, that Congress had this opportunity to annul or modify any of these Regulations but did not.

* * *

If Section 1,044 of the Revised Statutes had theretofore any application in the Consular Courts of China, it has no force as a rule of procedure in the United States Court for China, because Congress has provided otherwise in the act creating the Court. Rule 82 of the Consular Court Regulations is made the law of this jurisdiction respecting the limitation of criminal prosecutions.”

III.

THE TRIAL COURT DID NOT ERR IN RESERVING RULINGS ON OBJECTIONS TO THE ADMISSIBILITY OF EVIDENCE.

1. The opinion of the court in this case took the place of such a ruling.

It is contended by counsel that the trial court erred in reserving ruling upon certain objections to the admissibility of testimony adduced on be-

half of plaintiff inasmuch as no express ruling was made upon these objections prior to judgment.

The nature of the testimony to which such objections were made was that it went to show that the services of Mr. Steele were reasonably satisfactory. The point of the objections was that inasmuch as plaintiff had admitted, by his failure to deny in his replication, the allegations contained in the answer that the services were actually unsatisfactory, this issue was not open at the trial. We have dealt with the merit of such a claim concerning the effect of the pleadings, under Section II of this brief, and it is unnecessary to go into that matter again at this point. We believe, however, that under that section we have established the fact that the court was right in holding that it was unnecessary to make such denials in the replication. If the court was right in reaching such conclusion, its decision on that point was also a ruling upon the question of the admissibility of testimony, objections to which were based upon the necessity of such denials.

The only cases referred to by counsel in support of the proposition that such a reservation and failure subsequently to rule is error, are *Stanwood v. Carson*, 169 Cal. 640, and several earlier California decisions. There is no intimation that such a rule would be followed by any Federal Court or in particular by the United States Court for China, especially where the effect of the ultimate decision of the court is to render such specific rulings unnecessary.

2. **Even under the rule existing in California, the reservation in this case would not amount to reversible error.**

But even if this court were to hold that the California rule with regard to reservation of rulings did bind the United States Court for China in the trial of this case, still a reversal could not be predicated upon what occurred at this trial.

Referring to the latest case in California upon this point, to wit, the case of *Stanwood v. Carson*, *supra*, it is clear that the rule in that state is not simply to reverse cases where ruling has been reserved, but is to inquire into the circumstances and see whether or not by such reservation a party has been prejudiced. It is true that in that case such a practice is reprobated. We do not ourselves believe that it is the most satisfactory manner in which to pass upon the admissibility of evidence. It should be borne in mind, however, that the particular point in issue was one which depended upon the construction of a consular court's rules and their bearing upon procedure in the United States Court for China, together with the determination of whether or not the Alaska code controlled, and if so, to what extent. It is not surprising that the trial court was unwilling, offhand, to make a ruling upon this point. In *Stanwood v. Carson*, *supra*, the court refused to reverse the judgment of the lower court where there had been a reservation of ruling and a failure subsequently to rule expressly, the court saying:

“It is true, and always has been, that the practice of deciding a case without in terms declaring upon reserved rulings touching the admissibility of evidence is a practice to be reprobated and deplored. In some cases it may work substantial injustice to a litigant. In any case where it can be shown that such a result follows, the error is of sufficient gravity to call for a reversal. But it does not follow that injury is worked in every such case, and it is quite plain that it is not worked in the present case. It may be assumed as being the assumption of greatest benefit to appellants, and as being borne out by the decision which the court reached and expressed in its conclusions of law and judgment, that every one of plaintiffs’ objections was overruled. The next matter for consideration is whether any of them of material consequence to plaintiffs’ case was erroneously overruled, and, finally, whether by this method plaintiffs were denied the opportunity of introducing other evidence to meet, rebut, and overcome the evidence to the admission of which they objected.”

Did, then, the reservation prejudice defendant in its opportunity of introducing other evidence to meet, rebut and overcome the evidence to the admission of which they objected? We submit that it did not. Referring to the record, at page 228, it appears clearly that Mr. A. M. Paget was put upon the stand by the defendant for the express purpose of contradicting the testimony of plaintiff in regard to the satisfactoriness of the latter’s services. That the witness was put on for this purpose, and simply and solely in order to meet the testimony objected to and concerning which

the court reserved its ruling, is apparent from the statement of Mr. Bryan, found at the page in the record just referred to:

“Mr. BRYAN. I wish it to be expressly understood that *my* calling this evidence I do not in any way prejudice my rights in my motion for judgment under pleadings. I do not in any way admit that the facts that this witness will testify to are in issue.”

After making such an objection, Mr. Bryan attempted, though without much success, to establish that the services of Mr. Steele had been unsatisfactory.

IV.

NOT ONLY WAS THE DECISION OF THE ARBITRATOR IN TOKIO NOT BINDING UPON THE PARTIES, BUT THERE WAS, IN REALITY, NO VALID ARBITRATION AT ALL.

That portion of the brief of defendant which deals with the question of the so-called arbitration and award which took place before Mr. Potter in Tokio, gives evidence of much labor. Although no authorities are cited in that section of the brief, there is a prodigious amount of expanding done. Taking the meager and almost meaningless words of the award, and admitting reluctantly at the start that these words are not “satisfactorily phrased” or “as conclusive as a judicial decision”, and that they are more or less “cryptic”, counsel proceeds to “spell out of it” something in the nature of a decision, and, with that as a foundation, pro-

ceeds to determine what Mr. Potter really meant. We submit that it has been a noble effort at an impossible performance.

1. **The first section of the award of the arbitrator is either a mere expression of opinion or a delegation of authority.**

It being admitted in the case that an arbitrator has no authority to delegate his powers of decision to another, and that an arbitration attempting to make such a delegation is void, the question arises, Did Mr. Potter seek to delegate his powers as arbitrator when he used the following language in his so-called award:

“I am of the opinion that the matter of the three-year contract should be referred to Mr. Ward in San Francisco for settlement?”

The trial court concluded that either this was what it appears on the face to be, to wit, an attempted delegation of the arbitrator's authority to Mr. Ward, or “nothing more than an expression of opinion or suggestion, in which case it was not an award at all”. If it was an attempted delegation of authority, it has the double vice of being an attempted delegation to an executive officer of a corporation belonging to the same international commercial enterprise to which the defendant corporation belonged.

The effort made by counsel to show that this is neither a delegation of authority or mere expression of opinion, takes the shape of a statement, found at page 88 of defendant's brief, of what

counsel believes was really meant by Mr. Potter when he wrote the words above quoted. This interpretation, translation or expansion, or whatever it may properly be termed, is as follows:

“Mr. Steele has a three year contract executed in San Francisco between himself and American Trading Co. (Pacific Coast) through Louis A. Ward, its Vice President and Manager. I find that American Trading Co. (Pacific Coast) is a corporation separate and distinct from the defendant. Under these circumstances the plaintiff is without recourse against the defendant on the contract of May 27, 1918; he must look to the corporation with which he contracted, namely, the American Trading Co. (Pacific Coast), of which Mr. Ward is the Vice President and Manager. I therefore find against the plaintiff in respect of his claim based on the three year contract, and decide that the only liability on that contract is the liability of the corporation *which really employed the plaintiff*—i. e., American Trading Co. (Pacific Coast), or Mr. L. A. Ward, its Vice President and Manager, to whom I refer the plaintiff.”

We fear that such a construction of the first section of the award is almost too imaginative to be a fair and reasonable one. It puts entirely too many ideas into a sentence which does not contain a hint of them and which does not even hint that such ideas were in the mind of the writer when he wrote the sentence. Not only does Mr. Potter fail, in the award, to state that he found that the defendant company was in no way liable to Mr. Steele in connection with the three-year contract,

but such a conclusion cannot even be reasonably drawn from his words. He does not state, or even suggest, that Mr. Steele's only redress is against the American Trading Company (Pacific Coast). He merely says that in his opinion the matter of the three-year contract should be referred to Mr. Ward in San Francisco for settlement. The thoughts attributed by counsel to Mr. Potter may have been in his mind, vaguely; but we submit that if he did not express them in the award, or did not even suggest them, it would be a great injustice to Mr. Steele to read them into that award at this time.

Furthermore, even assuming that such a construction as counsel puts upon the first part of the award were a possible one, that section of the award would avoid the whole by reason of the peculiar terms upon which the matter was submitted for arbitration. In submitting the case to Mr. Potter for his decision, plaintiff used the following language in his letter of May 2, 1919, appearing at page 305 of the Record:

“* * * whose award must be considered as binding to both parties in the matter of the main issue involved in the case, viz, the amount of compensation to be paid me here at the Tokyo office of the company in *full settlement of all my claims against the company under the two agreements I have with the company.*”

According to the terms of the submission, the arbitrator was to settle all of Mr. Steele's claims against the company under the *two* agreements he

had with the company. That being the case, if the arbitrator had reached the conclusion which counsel asserts that he reached, the award would, nevertheless, be void because in determining that Mr. Steele's only redress was against the American Trading Company (Pacific Coast) he was determining that he could not settle all of the claims under *both* the agreements which Mr. Steele had, and therefore he was in duty bound, not being able to make a complete determination of the matter, to refrain from making any award at all. Where an arbitrator cannot or does not make a full determination of the controversy, according to the terms of the submission, his award is void as to the whole. See 5 Corpus Juris, 143, where the following language is used:

“The power of the arbitrators being confined by the submission, as already shown, the rule is not only that the arbitrators cannot go beyond the submission, but that they must decide all the matters embraced in the submission, which are brought before them by the parties or which are not withdrawn from their consideration by the parties. If they violate this rule, or if the award shows that they have not acted within it, the award will be void.”

Among the cases cited in support of the above quotation in Corpus Juris which are pertinent to the present discussion are:

White v. Arthur, 59 Cal. 33;

Boston & L. R. Corp. v. Nashua & L. R. Corp. (Mass.), 31 N. E. 751.

2. The second portion of the so-called award of the arbitrator renders the award void by reason of the fact that it leaves a portion of the matter in dispute open.

With regard to the necessity of an award being a final and complete determination of matters in dispute and covered by the submission, we again refer to *Corpus Juris* as an authority. In Volume 5 of that work, at page 139, the following rule is laid down:

“The award must be such a disposition of the matters submitted that nothing further remains to fix the rights and obligations of the parties, that the party against whom it is made can perform or pay it without any further ascertainment of rights or duties, and that further litigation shall not be necessary in order to adjust the matters submitted.”

The rule above referred to is supported by almost uncontradicted authority, and is virtually admitted by the strenuous efforts made by counsel for defendant to show that the second portion of the so-called award really is a complete and final determination of the dispute.

This second portion of the award is as follows:

“Second. That Mr. Blake should pay Mr. Steele in full until such time as Mr. Steele can secure first-class passage back to San Francisco less any indebtedness that may be proved that Mr. Steele owes Mr. Blake.

Hoping that this conclusion may be mutually satisfactory, I am, gentlemen,

Yours very sincerely,

(Signed)

William Potter.

P. S. Mr. Steele's passage to San Francisco to be paid by Mr. Blake's Corp.”

Counsel contends that the arbitrator, having disposed of the claim of Mr. Steele against the defendant with regard to the three-year contract, then proceeds to decide the dispute existing between him and the Tokio office. By that portion of the award Mr. Steele is given compensation in full until such time as he can secure first-class passage back to San Francisco, and payment of such first-class passage to San Francisco, "*less any indebtedness that may be proved that Mr. Steele owes Mr. Blake*".

The words which we have italicized obviously leave open the amount of the so-called award so that the burden is immediately placed upon the person claiming finality for it to prove that such finality really existed. An attempt at the assumption of such a burden has been made by counsel by a reference to the five hundred and forty odd yen admitted by plaintiff to be due to the defendant at that time. It is pointed out that plaintiff admitted that this indebtedness on his part amounted to the sum of 545.21 yen, whereas the defendant claimed only 541.21 yen, making a difference of four yen or about \$2.00, concerning which, far from being a dispute, there was merely a conflict of proof. Once again imagination is called to the rescue in the interpretation of Mr. Potter's cryptic phraseology, and there is read into the words, "*less any indebtedness that may be proved that Mr. Steele owes Mr. Blake*" the four yen difference in the two claims. Again we admit

that perhaps Mr. Potter *may* have had this possibility in mind. If he did, he was again unfortunate in his manner of expressing himself, because he does not even hint at such an idea. Under a reasonable interpretation of the language that he did actually use, Mr. Steele would have been perfectly justified had he subsequently determined that he owed the defendant less money than he had at first believed, in claiming that he owed such a lesser sum; whereas, on the other hand, if by a subsequent scanning of their books, the defendant company had come to the conclusion that Mr. Steele owed then five times as much as the 540 odd yen, they would have been justified in claiming such a set-off against what he was to be paid under the award. It is impossible to conceive of language which would more perfectly leave open for future dispute the amount to be paid by one of the parties.

Not only was the matter of amount left open, but the time for the determination of such indebtedness, the manner of proof which would be required, and the tribunal before which proof should be made, are all of them totally ignored. Whether or not Mr. Potter intended that the amount of indebtedness should be proven by an amicable agreement between the parties, by a future reference to himself, or by a resort to litigation in the courts of law, are all of them matters of equal uncertainty. The one thing that is certain about the second portion of the award is that it was wholly lacking in that finality which was necessary to make it binding.

V.

**THE TRIAL COURT, IN AWARDING DAMAGES IN THIS CASE,
FOLLOWED THE PROPER MEASURE.**

1. The plaintiff's recovery should not have been limited to the period of time intervening between the date of his discharge and the date of the trial, but was properly extended to cover his whole damage for wrongful discharge.

The plaintiff in this case, having been employed for a period of three years, and having been wrongfully discharged from that employment after the expiration of less than one year of the contractual period, brought this action long before the three-year period had expired. The trial court, in awarding damages to the plaintiff, declared that he was entitled not only to the money which he would have received between the date of his discharge and the date of the trial, but also to that which he would lose between the date of the trial and the end of the contractual period. Such a method of awarding damages is attacked by counsel. This attack is prefaced by the admission that there is a conflict of authority upon the subject. The brief for defendant then proceeds to attempt to show that the weight of authority is against the right of the discharged employee to recover any damages beyond the date of the trial. We submit that this attempt has failed.

The first proposition relied upon by counsel is that the cases which have arisen within this jurisdiction being in conflict, the question is now open

to this court. In this connection the cases of *Schroeder v. California Yukon Trading Co.*, 95 Fed. 296, and *American China Development Co. v. Boyd*, 148 Fed. 258, are referred to as the conflicting decisions. There is not the slightest question that the first decision referred to wholly supports the defendant's contention in that it holds clearly that a discharged employee is not entitled to any recovery beyond the date of the trial if he brings his action before the expiration of the contract term. The case of *American China Development Co. v. Boyd* is just as unquestionably an authority supporting the method of the trial court in awarding damages in this case and in support of our contention in this brief. A conflict then exists; but we do not believe that it is an equal conflict. For numerous reasons the case last cited should prevail over the *Schroeder* case. First of all, it is a much later decision, having been decided eight years after the *Schroeder* case. Secondly, it is a decision by a court of superior jurisdiction, inasmuch as it is a Circuit Court decision, while the *Schroeder* case was the decision of a District Court. Thirdly, it is a decision in a case arising in the United States Court for China, the very jurisdiction in which the case at bar was originally tried, and for that reason it must be taken as laying down a rule for the measure of damages in the United States Court for China in such cases. Fourthly, it is in accord with the subsequent decisions of the Federal courts.

And, lastly, it is in accord with the decided weight of authority in this country at the present time.

In support of our contention that *American China Development Co. v. Boyd*, *supra*, expresses the doctrine followed in subsequent Federal decisions, we call to the court's attention the case of *Lewis v. Sherin Co.*, 194 Fed. 976, and also the case of *Pierce v. Tennessee Coal etc. R. R. Co.*, 173 U. S. 1. In the latter case the court, in referring to the measure of damages in the case of an employee who had been wrongfully discharged and who had brought his action before the contractual period had expired, said:

“But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future, as well as in the past, if the contract had been kept. In so doing, he would simply recover the value of the contract to him at the time of the breach, including all the damages, past or future, resulting from the total breach of the contract.”

Small argument is necessary to establish that the trial court is supported by the general weight of authority. We believe that we can establish this by the use of the very authorities relied upon in defendant's brief. At pages 94-95 of that brief there appears a quotation from *Sutherland on Damages*, 3rd edition, Volume 3, where a portion of Section 692 is set forth. Immediately following that quotation on page 95 of the brief is a statement:

“The authority then refers to the ‘strong and well supported dissent from this doctrine’, treating the Wisconsin case as representing the prevailing doctrine.”

A careful reading of the paragraph in Sutherland following that quoted in defendant’s brief shows that the author does not regard the doctrine of the Wisconsin case as the prevailing one. The language of that following paragraph is as follows:

“There is, however, a strong and well supported dissent from this doctrine. *The tendency of judicial opinion is in favor of the application of the general rule that all the damages resulting from the breach of a contract must be recovered in one action.* The difficulties in the way of assessing the damages before the expiration of the time during which the contract was to run are not greater than those which exist in some other actions—notably those for personal injuries.” (Italics ours.)

The authorities set forth in the footnote in Sutherland, in support of the legal proposition which we have just quoted above, outnumber numerically and are more imposing as to the importance of jurisdiction than the authorities cited by him in support of the contrary view.

In view of the fact that there is admittedly some conflict upon this question in the United States, counsel has been singularly unfortunate in his choice of cases cited as instances of this rule. Although quite a number of cases could have been cited on this proposition which undoubtedly would have

supported him, he has relied upon three decisions from New York Supplement, to-wit: Sommer v. Couhaim, 54 N. Y. Supp. 146; Bassett v. French, 31 N. Y. Supp. 667, and Stein v. Kooperstein, 102 N. Y. Supp. 578. It is true that all three of these cases state unequivocally that a discharged employee may not recover for prospective damages to accrue beyond the date of the trial of the case; they are not authorities for such a proposition, however, at the present time, for the reason that in the well considered case of Davis v. Dodge, 110 N. Y. Supp. 787, the court went at some length into this matter, and after determining that the weight of reason and authority throughout the country, together with the case of Everson v. Powers, 89 N. Y. 527, were contrary to the former decisions in New York holding that the employee could not recover beyond the date of the trial, reversed the court's former position as to these decisions. The doctrine of Davis v. Dodge has subsequently been consistently followed in that state.

In California the question of the allowance of such damages was definitely determined in the case of Seymour v. Oelrichs, 156 Cal. 782, in which case, upon a second appeal reported in 162 Cal. 318, the court reaffirmed its former decision in this regard. In both of these decisions it is clearly held that where the employee brings an action before the expiration of the contract period, he is *prima facie* entitled to the total sum named in the contract less the amount that he has received as wages under the

contract and less also what he has actually made or what he by reasonable diligence should have made, or is likely to make at other employment up to the time set for the termination of the contract. In the first of these decisions by the California Supreme Court it was said:

“The gist of the complaint is in the breach of the contract and the injury resulting to plaintiff by reason of such breach. The action is not, in other words, one in which the plaintiff seeks to recover wages, but is for damages for the violation of the terms of the agreement by which he was employed for certain compensation to perform services for the defendants for a stipulated term of years. The measure of damages is, therefore, *prima facie*, the contract price.”

2. The court did not err in failing to make allowance for any moneys which plaintiff might have earned either up to the time of the trial or thereafter.

Taking the rule of damages as laid down in the case of Seymour v. Oelrichs, *supra*, as being the correct one, it is clear that the plaintiff in this case was entitled to the sum of \$10,000, less the amount of \$2500 which he admitted he had received as salary for ten months. This left the sum of \$7500, which was, *prima facie*, the amount to which he was entitled. If the defendant is to establish its contention that this amount should have been further reduced because plaintiff should have obtained other employment, either before or after the trial, the burden of proof was upon it to show that such employment should reasonably have been obtained.

We submit that such a burden has not been assumed with success.

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Counsel asserts that the amount of the judgment should have been cut down beyond \$7500 upon the theory that plaintiff should have obtained other employment prior to the time of the trial, and that by the exercise of reasonable diligence subsequent to that time he could have obtained such employment. Such an assertion overlooks two important limitations upon the right of an employer to make such deductions. The first of these is that the employee is not required, in order to mitigate damages, to accept employment of a kind or of a grade substantially different from that which he has had under his contract. Secondly, it overlooks the fact that if the employee has failed to mitigate damages to a reasonable extent the burden is upon the employer to prove such lack of diligence. Upon both of these propositions the record shows clearly that the trial court was right in making no further deductions.

It is virtually admitted in defendant's brief that the general rule does not require the employee to accept work of a different character or grade from that contemplated by the contract. Reliance is chiefly placed upon an alleged limitation of such a rule to the effect that the employee is justified in refusing to accept employment of a different kind or grade only until it becomes reasonably certain that employment such as he has been accustomed to is unobtainable and that thereafter he must ac-

cept any employment in mitigation of damages which may be offered, or suffer such a diminution of whatever damages he may recover from his employer. In support of this limitation, five cases are cited by counsel, the leading one being *Kramer v. Wolf Cigar Stores Co. (Texas)*, 91 S. W. 775. The number of cases cited in the brief becomes less imposing when it is noted that all five of them come from the same jurisdiction, all of them being Texas decisions. We submit that the doctrine enunciated in *Kramer v. Wolf Cigar Stores*, *supra*, and the other Texas cases, is contrary to the decisions in all other jurisdictions and is wrong in principle. The authorities holding that the discharged employee is not required to accept employment of a different character or grade are so numerous that it is unnecessary to cite many of them here. As an example, however, we refer the court to *Hinchcliffe v. Koontz (Ind.)*, 23 N. E. 271. In that case, with regard to the burden of proof of the reasonableness of the diligence of the employee in seeking other employment, and the kind of employment which he is required to take, the following appears:

“His duty is to use reasonable care and diligence in obtaining other employment of the same kind, and it lies upon the defendant to show that he did not use diligence, or that other similar employment was offered and declined. *Howard v. Daly*, 61 N. Y. 362; *Chamberlin v. Morgan*, 68 Pa. St. 168; *King v. Steiren*, 44 Pa. St. 99. And it may be remarked, as applicable to one of the instructions of which complaint is made, that, while a servant wrong-

fully discharged is obliged to use reasonable diligence to obtain other employment, *he is not bound to accept employment of a substantially different character or grade.* Many other questions relating to rulings of the court in admitting and excluding evidence are made on the briefs. The questions are not substantially different in character from those already remarked upon. We have carefully examined the several points made, and it is sufficient to say, without setting out each in detail, that they are not sustained. The charge of the court comprises a series of 13 separate propositions, in which the law covering every feature of the case is expounded to the jury with admirable precision and clearness. In a case like the present, the amount of damages to which the plaintiff is entitled, in case the dismissal was wrongful, is *prima facie* the amount stipulated to be paid. This may be reduced in event the defendant makes it appear that the plaintiff either did or could by reasonable effort have procured other employment, or that he did occupy his time at his own or other remunerative business.”

Another case which lays down the rule is *Inland Steel Co. v. Harris (Ind.)*, 95 N. E. 271, where the court approved the following instructions:

“The court instructed the jury that it is the duty of a person, when unlawfully discharged, to make reasonable effort to obtain work elsewhere, and that in no event could he recover more than what his actual loss might have been had he made such reasonable effort to obtain employment; that the employment he is required by the law to seek is that which is similar to or of the same general character, is, that which he had contracted to perform; that ap-

pellee was bound to seek employment which was of the same general character as that of his trade as a roller.”

Upon the authority of *Kramer v. Wolf Cigar Stores Co.*, *supra*, counsel also maintains that it was incumbent upon the plaintiff in the case at bar to return to America in case he could not obtain employment of the same grade as that to which he was accustomed. Such an argument entirely overlooks the fact that, so far as it appears from the record, plaintiff might have been stranded without funds in the Orient by reason of his unjustified discharge from defendant's employ, and therefore be entirely without the means of returning to the United States. It is also in conflict with the doctrine laid down in other cases to the effect that an employer has not the right to require that his employee should seek employment elsewhere than at the stipulated place for the performance of the contract. See *Costigan v. Mohawk & Hudson R. R. Co.* (N. Y.), 2 Denio 609, where the court in this connection said:

“It should have been business of the same character and description, and to be carried on in the same region. The defendants had agreed to employ the plaintiff in superintending a railroad from Albany to Schenectady, and they cannot insist that he should, in order to relieve their pockets, take up the business of a farmer or a merchant. Nor could they require him to leave his home and place of residence, to engage in a business of the same character with that in which he had been employed by the defendants.”

Nothing could be more clearly established than the rule requiring the employer to bear the burden of proving lack of diligence on the part of the employee in seeking other employment. Upon this subject there is the following paragraph in 26 Cyc. at page 1006:

“*Matters in Mitigation of Damages.* The measure of damages for the breach of a contract of employment by the employer is *prima facie* the sum stipulated to be paid for the services, and the burden of reducing the damages by proof that the servant has, or might, with reasonable diligence, have obtained other remunerative employment after his discharge rests on the employer.”

As we do not believe that counsel for defendant has either questioned this rule of the burden of proof, or will be able to question it, we will not refer to any of the numerous cases which support it. Taking this as the rule, the question arises, has the defendant in this case borne such a burden so successfully that it may now ask for a reversal of the judgment upon the ground that it affirmatively appears in the record that the plaintiff might reasonably have mitigated the damages? We not only answer this question in the negative, but we assert that plaintiff has gone further than is required of him and has affirmatively proven that he could not have mitigated, or could not in the future mitigate, the damages awarded by the court. On direct examination the plaintiff testified, at page 178 of the Record, that at the time of the trial he was not employed but that he was seeking employment as

a public accountant. On cross-examination, at page 179 et seq. of the Record, he testified that he had made application to a number of companies, namely, Mitsui, the Standard Oil Company and the Horne Company, without being able to obtain employment as an accountant. On direct examination in rebuttal, at page 253 of the Record, plaintiff testified that he had also applied for employment to Stevenson & Carlson, to the Asia Bank and to the Grace China Co. for employment, without success. On cross-examination in rebuttal, at page 255 of the Record, he testified that he had not accepted, nor was he willing to accept, employment as a book-keeper, and admitted that such employment was open to him in Shanghai, giving as his reason for such a refusal the fact that in that city a book-keeper was bunched with Portuguese and Chinese. He further testified on cross-examination in rebuttal that he had called upon Mr. Adams, of the China Realty Company, a man named Merriman, a Mr. Fuller, of the Thomas Simmons Company, and the American Chinese Company. At no time during the trial was either counsel for defendant or one of defendant's witnesses able to suggest a likely employer of accountants without plaintiff being able to state readily that he had called upon that person and had been rejected. It thus appears that prior to the trial, although only a short time had elapsed since his discharge, plaintiff had made extraordinary efforts to obtain employment, and that, without defendant being able in any way to meet the

burden upon it to prove lack of such diligence, plaintiff had in advance established the diligence affirmatively.

It must be borne in mind that the nature of the refusals on the part of the persons to whom application was made by Mr. Steele for employment make it clear that there could be no more hope in the future than there had been in the past. He was not refused because of a temporary oversupply of accountants, but simply because it was not the policy of the large firms in the Orient to employ their principal employees there. That the general rule of law which does not require an employee to accept employment of another kind or grade is peculiarly applicable to conditions existing in China, so far as Americans and Europeans are concerned, is shown by the language of the decision of the trial court in this case. No one could be more familiar with such conditions than he; and he well expresses his view when he says (p. 159):

“He stated that he could probably obtain a subordinate position as bookkeeper, but intimates (p. 68) that to accept it would cause him to lose standing as an accountant, which anyone familiar with conditions in Shanghai can well understand. We cannot think that a party whose contract has been broken is obliged, in order to reduce his adversary’s damages, to accept employment which would affect injuriously his own future career.”

In arriving at the conclusion that plaintiff’s damages should not be cut down beyond the amount

prima facie due, the trial court must have taken into consideration the fact that defendant could not require the employee which it had wrongfully discharged to return to the United States, and also that it did not appear from the Record that the discharged employee was financially able to do so, or that once here, conditions in this country would be such that he would be successful. In any case, the evidence already referred to as existing in the record was so strong as establishing the diligence of plaintiff in seeking to mitigate damages, and the unlikelihood of the possibility of such mitigation certain, that at least there existed no more than a conflict of evidence upon the question of the possibility of future mitigation. Under such circumstances, there being substantial testimony in the Record in support of the conclusion of the court with regard to the amount of damages, the judgment will not be reversed upon such a ground.

From the foregoing it is clear that the trial court did not err in determining the amount of damages in this case to be the amount *prima facie* due plaintiff, to-wit: the sum of \$7500.

VI.

THE COURT DID NOT ERR IN FAILING TO DEDUCT FROM THE AMOUNT OF THE JUDGMENT THE SUM OF \$507 MEX. AS BEING DUE FROM PLAINTIFF TO THE DEFENDANT.

The final point attempted to be made by defendant in its brief is that even though a judgment for

plaintiff should have been given in this case, such a judgment should have been cut down at least to the extent of \$507 Mex. This sum, it is asserted, was admittedly due from plaintiff to defendant.

The closest scrutiny of the Record fails to disclose any basis whatsoever for such a claim. We are referred by the brief of defendant to pages 57 and 58 for substantiation of this claim. Upon these pages, together with page 59, is set forth, as a portion of the so-called brief of plaintiff in support of his claim before Mr. Potter, the arbitrator, a statement of his claims against the defendant. On page 59 there is found, it is true, as defendant contends, a deduction of 545.21 yen, which at that time plaintiff admitted was due from himself to his former employer. Even if the character of this so-called brief did not preclude it from coming within the terms of the stipulation entered into between the parties upon the first day of the trial of this case concerning correspondence received by Mr. Burns from Mr. Blake, and even though there were actually in the record in this case testimony to the effect that some time in May of 1919 the plaintiff did admit that at that time he owed the defendant the sum of 545.21 yen, such an admission would be far from admitting that his indebtedness continued down to the time of the trial. In the interval which went by between the arbitration of the case in Tokio and the trial in Shanghai, two things might have happened which would justify the plaintiff in denying that such an obligation still

existed: by that time he might actually have paid the defendant, or he might have come to the conclusion, in the light of subsequent calculations, that he had been wrong at the time of the arbitration in his conclusion that he was indebted to the defendant in such an amount or in any amount at all.

With such shaky support in the record for such a claim, and in view of the entire absence of such a claim from either the answer of the defendant or of the actual testimony adduced by it at the trial of this case, the claim that any deduction should be made upon such a ground is entirely unwarranted.

VII.

THE APPEAL OF THIS CASE SHOULD BE DISMISSED FOR THE REASON THAT NO MOTION FOR A NEW TRIAL WAS MADE IN THE COURT BELOW PRIOR TO TAKING OUT A WRIT OF ERROR.

A glance at the record in this case will show that no motion for a new trial or anything in the nature of such a motion was ever made in the United States Court for China, the trial court. While a motion for a new trial is not a prerequisite to an appeal, using appeal in its broadest sense, as a general rule in jurisdictions where there is no statute or rule of court upon the subject, nevertheless, as will be noted at page 960 of 3 Corpus Juris, in a majority of the jurisdictions of the United States

such a step is made necessary by statute or by the rules. Whether or not, then, such a motion was necessary in this case before an appeal could be perfected depends upon the statutes and court rules in effect in the jurisdiction of the United States Court for China.

In Section II of this brief we have already had occasion to refer to both the statute which provided for the nature of the remedies and procedure to be followed in the old Consular Courts, and the manner in which such remedies and procedure were adopted by the act of Congress which, in 1906, established the United States Court for China. The same reasoning that we followed in Section II of this brief in urging the conclusion that no replication was necessary in this case, may properly be followed in determining that the procedure of the old consular courts is binding upon the United States Court for China at the present time so far as the necessity for a motion for a new trial as a prerequisite for an appeal is concerned.

In this connection the case of *United States v. Engelbracht*, 1 Ex. Ter. Cases 169, found in Appendix A of this brief, is authority for holding that the existing procedure referred to in the organic act creating the United States Court for China is the old court regulation.

Was, therefore, a motion for a new trial necessary under these court regulations? We submit

that it was. Regulation 41 provides “within five days after judgment the appellant must set forth his reasons by petition filed with the consul, which shall be transmitted as soon as may be to the Minister with a copy of the docket, entries and all papers in the case”. The reasons referred to are, of course, the reasons for a new trial. For the word “consul” we must now understand “court” or “clerk”, and the evident purpose of the provision is to give the trial court an opportunity to review its judgment and to modify or set aside the same should the grounds in the petition be found to be well taken.

The filing of such a petition has in fact been held a prerequisite in an appeal from the Consular Court to the United States Court for China. (*Katz v. Barkovitch*, United States Court for China, 1 Ex. Ter. Cases 205, which will be found in Appendix B of this brief.) There is no reason why the rules should not be the same in appeals from the United States Court for China, whose procedure is required to be “in accordance with” that of the Consular Court. Nor is this requirement in any way affected by the provision in paragraph three of the act creating the United States Court for China that “appeals and writs of error shall be regulated by the procedure governing appeals within the United States.” Section 41 of the court regulations above quoted is not an attempt to regulate the appeal, but a requirement as to what must be

done before the appeal is taken. In other words, it prescribes a condition precedent, and where the local practice so prescribes the Federal procedure "shall conform" thereto "any rule of court to the contrary notwithstanding" (U. S. Revised Statutes, Section 914).

The requirement of Section 41 is unquestionably a wise one, because a litigant should not be allowed to conceal points from the trial court or withhold mention of errors which have escaped its notice in the hurry and strain of the trial, but which could be speedily corrected if brought to its attention in the mode prescribed by this requirement.

It is obvious, therefore, that the appeal in this case should be dismissed upon the ground that the condition precedent to the taking of the said appeal has not been complied with.

For the reasons and authorities herein before set forth in this brief, we submit that the appeal in this case should be dismissed, and that, in any case, even though this court shall consider the matters urged on this appeal by the defendant below and plaintiff in error here, it should come to the conclusion that all of the six points urged by counsel are either wholly without merit or concern themselves with trivial matters not in any way prejudicial to the

said plaintiff in error, and that, therefore, the judgment of the court below should be affirmed.

Dated, San Francisco,
February 25, 1921.

CHICKERING & GREGORY,
DONALD Y. LAMONT,
JERNIGAN, FESSENDEN & ROSE,
Attorneys for Defendant in Error.

(APPENDIX FOLLOWS.)

Appendix.

APPENDIX A.

In the United States Court for China

UNITED STATES vs. CHARLES A. ENGELBRACHT.
(*Criminal Cause No. 33; filed October 25, 1909.*)
SYLLABUS.

1.—LEGISLATION: *Procedure: The Consular Court Regulation of 1864, and later, still govern the procedure of American Courts in China except so far as the Judge of this Court has exercised his statutory "authority** to modify and supplement" them.*

2.—:—: Such Regulations prevail even over inconsistent acts of Congress not expressly relating to this jurisdiction.

3.—:—: *The limitation of criminal proceedings prescribed by sec. 82 of said Regulations, and not the shorter one of Rev. Stats. sec. 1044, applies here.*

4.—: *Exegesis: The maxim Expressio unius est exclusio alterius, applied.*

Arthur Bassett, Esq., U. S. District Attorney, for the prosecution.
F. M. Brooks, Esq., *contra*.

THAYER, J.:

This is a criminal proceeding upon information filed by the District Attorney, which charges that on or about June 2, 1906, in Shanghai, China, the accused, at that time Marshal of the Consular Court for the District of Shanghai, embezzled certain funds which had been paid into said Court and which came into his hands as Marshal.

The accused has filed a plea in bar, alleging that, inasmuch as the action was not instituted within three years after the offense charged was alleged to have been committed, prosecution therefor is barred by the provisions of Section 1044 of the Revised Statutes of the United States, which reads:

“No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment

is found, or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial or punishment for any offense barred by the provisions of existing law."

To this plea in bar the District Attorney has filed a replication alleging that said plea is not sufficient because the law providing for the limitation of prosecutions in the jurisdiction of China is defined in Title XV of the Consular Court Regulations for China and not by the provisions of section 1044 of the Revised Statutes.

Section 82 of Title XV of said Consular Court Regulations reads as follows:

"Heinous offenses, not capital, must be prosecuted within six years; minor offenses within one."

The question presented is, Does the Consular Court Regulation referred to furnish the rule of law for this jurisdiction, notwithstanding the provisions of section 1004 Rev. Stats., with which it conflicts? The question is not one of easy solution. It presents many difficulties by reason of the status of this Court as an extraterritorial one and the necessity thus arising for differentiating it from other United States Courts.

The jurisdiction of all our Federal Courts in the United States is clearly defined and the body of law which those Courts administer can usually be ascertained with little difficulty. This is not equally

true of the extraterritorial courts created by the United States, tho the necessity for their existence, and the authority under which they have been created, has never been questioned. The difficulties arise from the admitted fact that the powers of these tribunals have never been clearly defined.

Sections 4083 to 4130, inclusive, of the Revised Statutes of the United States are a codification of the laws enacted by Congress to define the judicial authority conferred upon Ministers and Consuls in conformity with the provisions of treaties of the United States with China and other countries within which extraterritorial jurisdiction was to be exercised.

Section 4086 specifies the body of law which shall be administered by such Courts and its provisions may briefly be summarized as follows:

(1) The laws of the United States are extended over our citizens in China "so far as they are suitable" to give effect to the treaties with China.

(2) In all cases where such laws are "not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies", the common law, and the law of equity and admiralty, "are extended in like manner over our citizens in China".

(3) If neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, "furnish appropriate and sufficient remedies", the ministers, respectively, shall supply such defects and deficiencies by "decrees and regulations which shall have the force of law".

Section 4117 relates to rules of procedure for the Consular Courts and provides that they shall be made by the minister with the advice of the several consuls. It specifies various matters of procedure respecting which the minister shall make rules and concludes with mandatory authority "to make such further decrees and regulations, under the provisions of this Title, as the exigency may demand."

It should be observed that this latter provision relates not only to matters of procedure covered in section 4117, but, as stated, to such further decrees and regulations as the exigency may demand, "under the provisions of this Title, viz: Title XLVII, which includes section 4086, hereinbefore referred to.

Section 4118 provides for the publication of such Regulations, decrees and orders and makes them binding and obligatory until annulled or modified by Congress. Regulation 82, referred to, is one of those thus adopted and it has not been annulled or modified by Congress.

On June 30, 1906, Congress created the United States Court for China. It should first be noted that the jurisdiction of the Consular Court in China, defined by the several statutes above cited, had been exercised for many years prior to the passage of the act organizing this Court. The Act provides that the Consular Courts are still to exercise a limited jurisdiction. This fact, the appellate jurisdiction given to the United States Court for China,

the requirement that the Judge and District Attorney shall be lawyers of good standing and experience, and other manifest reasons, indicate that the general purpose of Congress was to provide a higher and more efficient tribunal than had theretofore existed in China for the exercise of the judicial functions authorized by the treaties.

The act is neither long nor elaborate in its provisions. Section 4 relates to the body of law which shall guide the Court in the exercise of its jurisdiction and provides:

(1) The treaties must be complied with.

(2) The jurisdiction must be exercised in conformity with the laws of the United States in reference to the American Consular Courts in China which were in force at the date of the passage of the Act. This covers such parts of sections 4083 to 4130, inclusive, of the Revised Statutes as are applicable to China and the Regulations, Decrees and Orders which have been promulgated in pursuance thereof which have been given the force of law.¹

One exception is made, and only one, viz., that sections 4106 and 4107, relating to summons of associates, shall not apply to this Court. The significance of this single exception must be recognized. It can hardly be construed otherwise than as an affirmative confirmation of all the other then existing laws and regulations. The familiar maxim *expressio unius est exclusio alterius* obtains.

1. Secs. 4,086, 4,117 and 4,118.

(3) When “the laws now in force in reference to American Consular Courts in China,” are deficient in certain named respects, resort may be had to the common law and the law as established by the decisions of the courts of the United States. The deficiencies here specified differ in language and substance from those described in section 4086 of the Revised Statutes, and must be construed in connection therewith and as additional thereto. There is nothing in section 4 which touches directly the question here presented.

Section 5 relates to the procedure of the court and provides that it shall be “in accordance, so far as practicable, with the existing procedure prescribed for Consular Courts in China in accordance with Revised Statutes of the United States,” the judge being given power to modify and supplement the said rules. It is obvious that the particular Revised Statutes to which reference is made are those sections which we have already recited, contained in Title XLVII in pursuance of which the then existing procedure had been adopted. The words “in accordance with” are merely descriptive and not words of limitation.

In other words the procedure of the court which this statute provides is found in the existing Consular Court Regulations. The statute does not state that only such regulations shall be binding as the court may find to have been made in harmony with the Revised Statutes of the United States. It could have done so very easily by the use of appropriate

words. As the statute stands it is not rationally open to any other construction than that announced. The phrase “prescribed for Consular Courts in China in accordance with the Revised Statutes of the United States” is purely and simply descriptive.

All the existing Regulations had been laid before Congress, as required by law, many years before this statute was passed, and it must be presumed, under well established doctrine, that Congress had full knowledge thereof.² In fact it appears to the Court that the provision referred to cannot be considered as anything less than an affirmative recognition and confirmation of such of these regulations, at least, as relate to procedure. Whether or not the act must be considered as recognizing and confirming the whole body of these regulations existing at the date of the passage of this act, the Court does not at this time undertake to say. It is proper to note however, that Congress had this opportunity to annul or modify any of these Regulations but did not. Whatever objections may have been theretofore made to these regulations, based on a denial of the constitutional authority of Congress to delegate its legislative powers, it seems clear to the Court that the present action of Congress, in respect to such then existing regulations as relate to procedure of the Consular Courts, operates not only as a confirmation thereof but practically as an enactment of such regulations, exactly

2. *Clinton v. Englebrecht*, 13 Wall. (U. S.), 446, 20 Law Ed. 659.

the same as if they had been verbally recited in the act itself. However much their origin may be assailed, the regulations adopted under section 4117 are now clearly and unquestionably made binding and obligatory on this Court by direct and specific enactment.

If section 1044 of the Revised Statutes had theretofore any application in the Consular Courts of China, it has no force as a rule of procedure in the United States Court for China, because Congress has provided otherwise in the act creating the Court. Rule 82 of the Consular Court Regulations is made the law of this jurisdiction respecting the limitation of criminal prosecutions.

APPENDIX B.

United States Court for China.

MAURICE KATZ AND MARTIN KATZ, APPELLANTS

v.

H. BARKOVITCH, APPELLEE.

On Appeal from the United States Consular Court at Shanghai.

Civil Action No. 82; Order Dismissing Appeal, June 3, 1910.

Syllabus. Consular Court Regulations of April 23, 1864, Regulations 40 and 41, relating to appeals from Consular Courts, commented upon. Regulation 41, requiring that appellant "must set forth his reasons by petition filed with the consul" "within five days after judgment" is mandatory; and makes the filing of a statement of the grounds of appeal necessary.

Appellant failed to comply with this regulation. His appeal should not have been allowed.

Judgment for appellee with costs.

George F. Curtis, for appellant.

W. S. Fleming, for appellee.

RUFUS H. THAYER, JUDGE:—*Opinion.*

This is a civil action on appeal from a judgment of the Consular Court at Shanghai. Judgment was rendered in said court on May seventh, 1910, against the defendants there in the amount of seven hundred (\$700.00) dollars, local currency, with costs.

On May ninth, 1910 (May eighth being Sunday), defendants' counsel filed in the Consular Court a petition for issuance of writ of error out of the United States Court for China, reciting that certain errors had been committed to the prejudice of the defendants, concluding said petition with the statement, "all of which will more in detail appear from the assignment of errors which is filed with this petition". On the same date counsel also filed in the Consular Court a document entitled "Petition for Writ of Appeal". No assignment of

errors or statement of grounds of appeal appears attached to either of these petitions.

On May thirteenth, 1910, security for judgment and costs having been deposited, the trial judge allowed the appeal.

On May twenty-seventh, 1910, the transcript of record was received in the office of the clerk of this court.

Attached to said transcript is a certificate of the clerk of the Consular Court as follows: "I, . . . do hereby certify the foregoing transcript to be a full, true and correct copy of the docket entries in the above entitled cause; and that, except the transcript of the evidence and defendants' exhibit "M", the same together with the exhibits, constitute the transcript of the record herein upon appeal to the United States Court for China. And I do hereby further certify that although thereunto notified so to do, the defendants have failed and neglected to file with this court the stenographer's transcript of the evidence and defendants' exhibit "M", which was withdrawn from the files by the defendants . . ."

The Consular Court Regulations of 1864, Nos. 40 and 41, prescribe the conditions upon which appeals may be made from the Consular Court.

Regulation 40 provides: "40.—*Appeal must be within one day.* Appeals must be claimed before three o'clock in the afternoon of the day after judg-

ment (excluding Sunday); but in civil cases, only upon sufficient security."

Compliance with this rule was made by the appellants. A formal application for appeal was filed in the Consular Court within the time prescribed.

Regulation 41 reads: "41.—*To be perfected within five days.* Within five days after judgment, the appellant must set forth his reasons by petition filed with the consul, which shall be transmitted as soon as may be to the minister, with a copy of docket entries and of all papers in the case."

The provisions that "appellant *must* set forth his reasons" within five days after judgment is mandatory and cannot be construed otherwise than as a requirement that within the time stated the appellant must file in the Consular Court a statement of his *grounds of appeal*.

The appellant having failed to comply with this mandatory rule, it is obvious that the appeal should not have been allowed.


Counsel for the appellee has submitted a motion for the dismissal of this appeal on the ground stated and also on other grounds to which it is unnecessary to refer.

The two regulations referred to constitute all the rules now existing relating to appeals from the Consular Courts. They are simple and easily understood. Moreover, the requirement that an appeal should be accompanied by a statement of

grounds of appeal is in harmony with the procedure obtaining in all American judicial systems. The rule is so plain that a layman could not misunderstand it. The defendants had failed to comply with its simple requirements within the time fixed by the regulation, and thus the right of appeal was lost.

The motion is considered as a motion to docket and dismiss and, for reasons stated, it is granted, and the appeal is dismissed.

An order will be entered requiring appellants to pay into this Court the proper fees and costs and remanding in due order the transcript of record to the Consular Court for further appropriate proceedings in that Court.



United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Eastern District of Washington, Southern Division.

FILED
NOV 19 1920
F. D. MONCKTON,
CLERK

No. 3587

United States
Circuit Court of Appeals
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Superior Court of the State of Washington
in and for Franklin County.

JAMES E. CARR,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Complaint.

Plaintiff complains and alleges:

1.

That at all times herein mentioned, the defendant was, and now is a public service corporation, doing an interstate business as such. That during the month of October, 1908, the plaintiff was employed by the said defendant, and at all times herein mentioned continued in such employ.

2.

That when the plaintiff entered the employ of the defendant and at all times herein mentioned, the defendant agreed for a valuable consideration, to wit: a certain monthly fee deducted from the wages of the plaintiff to provide the plaintiff with medical, surgical and hospital attention, at such times and in such amounts as the plaintiff should require, either by reason of injury or sickness. That the amount stipulated was deducted monthly by the defendant from the wages due the plaintiff during the entire period of the employment aforesaid. That for the purpose of carrying out this transaction, the de-

fendant employed physicians and surgeons along its line, and organized and maintained a hospital at Tacoma, Washington, and employed therein physicians, surgeons and attendants.

That in January, 1913, the plaintiff became sick with appendicitis, and pursuant to said arrangement, the said plaintiff was taken to the hospital of the defendant at Tacoma, Washington, there to be operated upon, or to be treated for appendicitis. That upon arriving at the hospital at Tacoma as aforesaid, the plaintiff was operated upon by one of the physicians and surgeons therein employed, to wit: Dr. S. W. Mowers, and was then provided with nurses and attendants by the defendants as aforesaid. That the defendant was negligent in the treatment and care of this plaintiff, as follows:

First. The surgeon operating upon the plaintiff failed to remove all of the infected portion of the appendix, allowing a portion of such appendix to remain.

Second.—In making the incision for the purpose of removing the appendix, the surgeon made an incision larger and longer than ordinary, and failed to properly close the incision by bringing the various layers of the abdominal wall together, and placing sufficient sutures at proper intervals to hold the closure of said abdominal wall.

Third.—That owing to the condition in which the plaintiff was left after the operation, it was necessary and proper that he be bandaged so as to immobilize the parts to prevent the development of a hernia. That one of the attendants furnished by

the defendant, to wit: Eisengraver, was negligent in that he untimely removed the bandage aforementioned with the natural and expected result that hernia developed, through such untimely and negligent removal.

3.

That thereafter, the surgeons in the hospital aforesaid instructed the return of the bandage with proper dressing for attention. That thereafter, the attendants furnished by the defendant failed and refused to properly dress the said wound once for a period of three to four days, and once for a period of five days, with the result that serious infection occurred.

4.

That by reason of the careless and negligent manner in which the plaintiff was treated, the wound as aforesaid failed to heal, and the servants and agents of the defendant failed and refused to remove the remnant of the appendix and failed and refused to operate for the hernia caused by the neglect as aforesaid, although the plaintiff continued under the care and treatment according to the previous agreement and understanding up to the year 1919, and up to which time the defendant's neglect continued. That the defendant, through its officers, agents and employees failed and refused to advise the plaintiff as to the true condition, but at all times assured him that he was receiving proper treatment and would get well, and in the year 1917, instructed him to report for examination as to his ability to work. That his condition, due as aforesaid con-

tinued to get worse, and on the 4th day of March, 1918, the plaintiff submitted to an operation, for the removal of the residue of the appendix, which was in part the cause of the plaintiff's condition and for a correction of the other negligent treatment hereinbefore complained of.

5.

That at the time of the negligent operation, and the negligent treatment complained of by the plaintiff, he was about thirty-six years of age, mentally and physically well, and in good condition, and able to earn upwards of \$300.00 per month. That by reason of the negligence complained of, the plaintiff has been caused continuous and extreme suffering and pain, and complete loss of health, and has been permanently disabled in his earning capacity, and has suffered damages in the sum of \$75,000, all through the acts of the defendant, its officers, agents and agencies.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of \$75,000, together with his costs and disbursements herein, and such other relief as may be just and proper.

CHAS. W. JOHNSON,
Attorney for Plaintiff.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

JAMES E. CARR,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Answer.

Comes now the defendant, and for its answer to
the complaint of the plaintiff states:

I.

Admits Paragraph 1 of plaintiff's complaint to be
true.

II.

Answering Paragraph 2 of plaintiff's complaint
defendant denies each and every matter and thing
therein stated, whether as therein alleged or other-
wise.

III.

Answering Paragraph 3 of said complaint de-
fendant denies each and every matter and thing
therein stated, whatever as therein alleged or other-
wise.

IV.

Answering Paragraph 4 of said complaint de-
fendant denies each and every matter and thing
therein stated, whether as therein alleged or other-
wise.

V.

Answering Paragraph 5 of said complaint defendant denies each and every matter and thing therein stated, whether as therein alleged or otherwise.

For a first affirmative answer and defense to plaintiff's alleged cause of action, defendant states:

1.

That heretofore, and prior to October, 1908, a certain association of railway employees organized themselves together for their mutual benefit and advantage in an association known as the Northern Pacific Beneficial Association, and said association since prior to 1918 has operated a line of hospitals in the different states through which the Northern Pacific Railway operates and employed and still employs physicians and surgeons, nurses and hospital attendants as such hospitals and also at and in the towns through which said railway company operates a line of railway. For the purpose of furnishing funds with which to operate said hospitals and pay such physicians, surgeons and other employees, it was agreed and ever since has been agreed by the railway employees of said Northern Pacific Company that a certain small sum of money shall each month be deducted from the salaries of its employees by the railway company and by it turned over to said Northern Pacific Beneficial Association, and said railway company has during all of said time so done. The amount paid by each employee depends upon the salary which he earns and defendant states that it has never in any man-

ner engaged in the maintenance of said hospitals or the employment of physicians or surgeons or made any profit whatever out of the same, but that said association is managed and controlled by railway employees for their own benefit.

That defendant is informed and believes that the surgeons whom it is alleged provided plaintiff with medical and surgical and hospital attention were the doctors, nurses and attendants employed by said association, and defendant alleges that this defendant had nothing to do with the employment thereof nor with their compensation.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

JAMES E. CARR,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

Reply.

Comes now, the plaintiff in the above-entitled cause, and for reply to the affirmative answer and defense contained in the defendant's answer, the said plaintiff denies each and every material allegation contained therein.

WHEREFORE, plaintiff demands judgment as prayed for in his complaint.

CHAS. W. JOHNSON,
Attorney for Plaintiff.

Court's Instructions for Verdict.

Mr. JOHNSON: We rest.

E. J. Cannon for defendant moves for directed verdict.

Argument by counsel for Plaintiff and authorities cited.

The Court instructs jury to return verdict in favor of defendant, Northern Pacific Railway Company.

Verdict returned as instructed.

Exception by Plaintiff.

Chas. W. Johnson for plaintiff asked permission to present matters to perfect Writ of Error in Spokane. Permission granted.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

No. 879.

JAMES E. CARR,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the defendant.

M. L. McMURTREY,

Foreman.

Filed June 8, 1920. W. H. Hare, Clerk.

In the District Court of the United States for
the Eastern District of Washington, Southern
Division.

JAMES E. CARR,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation.

Judgment.

The above-entitled action having been duly called for trial and a hearing before a jury on the 7th day of June, 1920, in the United States Court Room in the city of Walla Walla, Southern Division of said District Court, and a jury having been duly called, the plaintiff being represented by Charles W. Johnson, his attorney, and the defendant by Edward J. Cannon, its attorney, and the court having duly heard the testimony of the plaintiff and his witnesses and the defendant's witnesses, and a motion having been made at the close of the testimony that the Court direct a verdict in favor of the defendant, which motion was argued and taken under advisement by

the court, and after having been duly considered said motion was granted, to which ruling of the Court plaintiff excepted, which exception was allowed, and said jury thereupon by instructions of the Court having brought in a verdict in favor of the defendant.

NOW IT IS ORDERED, ADJUDGED and DECREED that the plaintiff take nothing by this action and that a judgment be entered therein in favor of the defendant with its costs.

Dated June 21, 1920.

FRANK H. RUDKIN,
Judge.

Filed June 22d, 1920. W. H. Hare, Clerk. By E. E. Wright, Dep.

Testimony of James E. Carr, for Plaintiff.

JAMES E. CARR, called as a witness on his own behalf, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. JOHNSON.

Q. Mr. Carr, you are the plaintiff in this case?

A. Yes, sir.

Q. Where do you live?

A. Pasco, Washington.

Q. How long have you lived in Pasco?

A. I have lived there seven years.

Q. And were you ever in the employ of the Northern Pacific Railway Company? A. Yes, sir.

Q. When did you first enter into the employ of the Northern Pacific?

(Testimony of James E. Carr.)

A. October, 1908.

Mr. JOHNSON.—Q. Have you ever been discharged? A. No, sir.

Q. Have you ever resigned from their employ?

A. No, sir.

Mr. JOHNSON.—Q. By whom were you employed when you went to work for the Northern Pacific? A. The Trainmaster at Pasco.

Q. Who was the Trainmaster?

A. James Shannon.

Q. Did you make application for employment with the Northern Pacific at that time?

A. Yes, sir.

Q. Was there anything contained in the application with reference to your receiving such—

Mr. CANNON.—(interrupting) The application would be the best evidence of it.

The COURT.—The application was in writing, was it, Mr. Carr? A. Yes, sir.

Defendant's Exhibit "A."

4-07 25M 8

Form 515

NORTHERN PACIFIC.

Deft. Ex. "A" Admitted.

Application for Employment as Trainman.

The Superintendent will require all persons, before entering the service of this Company, to answer the following interrogatories in their own handwriting. Blanks must be filled up and signed in triplicate, two copies being forwarded to Superintendent with any letters of recommendation which

applicant may have, of which a record will be made and all letters other than those of Northern Pacific issued returned. Letters of recommendation or clearances issued by the Northern Pacific Railway Company, may be held by the Superintendent who will, if requested to do so, make notation of all previous service on the clearance which is issued from his office. The applicant will keep the third copy of this personal record for future reference. Superintendents will forward to General Claim Agent, St. Paul, one of the copies sent them.

1. Name in full—James E. Carr.
2. Birthplace—Winona. State—Minnesota.
3. Age—32 years last birthday.
4. Nationality—Irish.
5. Married or single—married.
6. If married, where does your family reside?—
No. 608. St.—Avon. Town or City—La-
crosse. State—Wisconsin.
7. If single, where does your family or nearest
relative reside, and what is his (or her) name?
..... No..... St.....
Town or City..... State.....
8. How many years experience in Railroad ser-
vice?—91½.
9. Ever injured; if so, on what road and to what
extent?—No.
10. In what business before entering Railroad busi-
ness?—Steamfitting and Plumbing. At what
place?—Winona. State—Minnesota.
11. Name ALL Roads on which you have been em-
ployed:

Railroad.	Name of Superintendent.	Address.	In What Capacity.	In What Year.
C M & St P	B F Van Vleit	Minneapolis	Bkm Switchm & Condr	1899— 1908

12. If you have been employed before on any Division of this Road, or Branches, state which one, when, and in what capacity?—No.
13. On what road last employed?—C. M. & St. P. River Division. Cause of leaving?—Resigned.
14. Number of letters of recommendation enclosed—None.
15. How have you been occupied since your last employment terminated?—No.
16. Have you read, and do you understand the following Rule of the Northern Pacific Railway Company?—Yes.
18. Do you agree to comply with all the requirements of the foregoing rule in case you enter into the Company's employ?—Yes.
19. You are notified that if you, or any other employe, chooses to violate the requirements of any other rules contained in the Book of Rules of the Northern Pacific Railway Company, you do so solely at your own risk. The Company expects you and all other employes to comply strictly with all of its rules and regulations, and does not, and will not, in any case acquiesce in or consent to any violation of them. Do you understand that all violations of the Rules of the Company by you or any other employe of the Company, whether habitual or otherwise, are not consented to or acquiesced in by the Company?—Yes.

20. Do you know that by a rule of said Railway Company its employes in all Departments are required to give the Company ten (10) days notice of their intention to quit the service, such notice to be given to the Superintendent or General Foreman of their Department, and do you assent to such rule in entering the employment of said Company?—Yes.
21. Do you understand that you are required to become a member of the Northern Pacific Beneficial Association upon entering the service of the Northern Pacific Railway, and do you assent to that Association's rules and monthly deductions from your salary for this purpose?—Yes.
22. Are you related to any officer or employe of this Company? If so, state to whom and how related.

This application made by James Edward Carr.

(Sign your name in full, no initials.)

Located at Pasco, Washington

Date—10-26, 1908.

Witness: Jas. Shannon.

No.———

NORTHERN PACIFIC.

Personal Record.

Name—J. E. Carr.

Occupation—Brakeman.

Date of Application—10/26, 1908.

Date Employed—.....190..

Division—Pasco.

 Above to be filled by Division Superintendent.

(Testimony of James E. Carr.)

Description of Person Named Within.

1. Height—5 ft. 11 in.
2. Form—Tall.
3. Weight—180.
4. Complexion—Light.
5. Color of Hair—Black.
6. Color of Eyes—Blue.
7. If beard is worn what color, and in what manner—None.

 Above to be filled by Applicant.

Certified to as correct

.....Employer.

Duplicate forwarded to Gen. Claim Agent.

.....190..

.....Supt.

Mr. JOHNSON.—Q. After you went to work for the Northern Pacific in 1908 was anything paid by you to the Northern Pacific for medical aid and attention and surgical attention?

A. It was taken out of my salary.

A. Why, I applied when I went to the hospital.

Q. Now then, when was that?

A. That was in 1913.

Q. To whom did you make application?

A. I called the doctor in.

Q. What doctor did you call in?

A. Dr. H. M. Johnson at Toppenish.

Q. What condition were you in physically when you called Dr. Johnson? A. I was sick.

Q. Who was Dr. Johnson at Toppenish?

A. Northern Pacific doctor at Toppenish.

(Testimony of James E. Carr.)

Q. What did he do with you then?

A. Well, he fixed me up and sent me over to Tacoma.

Q. Where did he send you in Tacoma?

A. To the Northern Pacific Hospital.

Q. Did you receive treatment in the Northern Pacific Hospital in Tacoma?

A. Yes, sir.

Mr. JOHNSON.—Q. When you were taken to the hospital at Tacoma from whom did you receive your first attention there?

A. Well, I don't know who it was examined me that evening.

Q. Did any of the surgeons of the hospital examine you the next day? A. No.

Q. What treatment did you receive at the hospital?

A. Prepared for an operation that night, to be operated on in the morning.

Q. Do you know who operated upon you?

A. Dr. Mowers told me he did.

Q. Who was Dr. Mowers?

A. He was the Chief Surgeon at Tacoma.

Q. Did Dr. Mowers tell you what your ailment was, or what you were suffering from or what he operated for?

A. Not right at the time; he told me in the morning.

Q. What did he say was your ailment?

A. He says appendicitis; remove the perforated appendix.

Q. Tell the jury as near as you can, what condition

(Testimony of James E. Carr.)

you found yourself in after the operation, that is, with regard to your bandages or the care that you had received immediately after the operation.

A. Well, after the operation—they made two incisions on the table, on the operating table; one was about three inches long, and then there was a smaller one lower down with. And the one above was sewed up on the table, closed and held together with tape, and they used the lower one for a drain.

Q. And the upper one was bandaged with tape?

A. That was with tape.

Q. How long was that bandage allowed to remain?

A. Well, on the incision that was sewed up?

Q. Yes.

A. That was on there from the end of January to the 1st of February.

Q. About how many days, would you say?

A. Oh, I should judge close on to three weeks.

Q. Was there any other sort of bandage aside from the adhesive tape?

A. There was a little piece of dressing just soaked in there underneath the tape to kind of soften it up a little where the incision was made.

Q. You say that bandage or dressing was removed in about three weeks after the operation. Who removed that bandage?

A. Why, they changed internes the first of the month, and a new interne came in and removed it, took the tape off.

Q. Was the surgeon present when the tape was removed? A. Only this interne.

(Testimony of James E. Carr.)

Q. Just the interne? A. The interne.

Q. Do you remember his name?

A. Eisengraver.

Q. What did he do after he removed the bandage, if anything?

A. Why, I asked him to leave them on and he told me it wasn't necessary.

Q. What followed after he removed the tape?

A. Well that night, why, I rolled around there and the side busted open.

Q. The stitches let go? A. Let go.

Q. What was the condition of your side the next morning?

A. It was blood; the dressing was saturated with blood, and clothes.

Q. Did the Chief Surgeon or his assistant come in and see you?

A. The assistant surgeon came in in the morning making his rounds.

Q. What was his name? A. Dr. Argue.

Q. Did he examine you then?

A. I called his attention to it and he looked at it, that is, he didn't look at the wound; just turned the clothes over; he didn't look at it at the time.

Q. He didn't look at it at the time?

A. No, just looked at the dressing.

Q. Did you complain to him about your condition?

A. I told him it was tore loose and he says I must be mistaken, and I says, "No, I don't believe I am, I think she let go last night, I am all saturated." "Oh," he says, "I guess you are mistaken." I says,

(Testimony of James E. Carr.)

“No, I ain’t, look,” and I turned the bed clothes back, and he could see the blood and he left there.

Q. What followed after that?

A. He and the interne Eisengraver came back in.

Mr. CANNON.—If we knew about how long that was after the operation it might help out.

Mr. JOHNSON.—He said about three weeks.

Q. What happened when he and the interne, Dr. Eisengraver, came back in?

A. Well, Dr. Eisengraver started to dress it and Dr. Argue stood at the foot of the bed, and Dr. Eisengraver was dressing the side and Argue stood back and he saw the condition I was in, and he kind of shook his head, he didn’t say nothing at the time. So finally Eisengraver was just about getting through when Argue spoke to him and says, “Better put them straps back on there; they ought to leave them on.” So he put the dressing on and Argue walked out.

Q. You refer to the tape that had been on there prior to that time? A. Prior to that time, yes.

Q. Was the tape put back on?

A. There was tape put back on, but there was dressing underneath.

Q. Different from what it had been originally?

A. Different from what had been in there.

Q. What, if anything more was said by either of the doctors there at that time?

A. Well, Dr. Eisengraver says, “You hadn’t ought to complain like that on me,” or words to that effect. “Well,” I says, “I had to do something.”

(Testimony of James E. Carr.)

Q. What did he say?

A. Why, he said that I hadn't ought to have called Dr. Argue's attention to it. I told him, "I think I ought to talk to somebody," I says.

Q. Then who of the attendants or surgeons there next saw you in connection with this wound?

A. Why, nobody, only this interne kept right on dressing me.

Q. Tell the jury and the Court in your own language, Mr. Carr, just what followed after the rupture that you have mentioned here in connection with the wound that had been left.

A. Well, this interne, he took care of my side there, I think for about a week, changing the dressings and stuff like that. So then one day he didn't show up at all, or the next day he didn't show up. So the third morning Dr. Argue came in the room, and I asked him how often my side needed attention, and he says, "Why, about once in twenty-four hours." "Well," I says, "this is pretty near three days now, and I haven't had no dressing or attention on it." "Well," he says, "maybe it don't need it." I says, "You better look and see whether it does or not," and I turned back the bed-clothes and Argue started right out the door then, and in come the interne with some dressing under his arm. He had his street clothes on, and he come in there complaining, "You are kicking all the time; you are kicking all the time."

Q. Did Argue see the condition of your side before he went out?

(Testimony of James E. Carr.)

A. He just saw the outside of the dressing and it was all saturated.

Q. And then the interne Eisengraver came back in, and what did he do?

A. He started to dress it, and he said I was complaining and kicking all the time. I asked him if he thought I was wrong in calling Dr. Argue's attention to this. I says, "I got to get some attention,—"

Mr. CANNON.—(Interrupting.) I don't see what difference it makes about their talks.

Mr. JOHNSON.—It is part of the conversation, and it is much easier for a witness to relate what was said and done.

The COURT.—Yes; just proceed.

Mr. JOHNSON.—Q. Go ahead, Mr. Carr.

A. He says, "No use kicking like that all the time; that won't get you nothing." "Well," I says, "I have got to have some attention." So he dressed it that day. He wouldn't answer me the first time—when he said I was kicking all the time I asked him—that was the second time—he says, "Maybe a little clean dressing wouldn't hurt it." So he fixed my side up and the next morning he never showed up at all, nor the next morning he didn't show up. The third morning he didn't show up, and I got some dressing from the nurse to put in in there, and I just tucked that underneath to soak up the stuff and pus; everything was running then, but I thought "What is the use of kicking; I am getting in awful bad"? and I wouldn't say

(Testimony of James E. Carr.)

nothing. So the next morning there was a fireman in there that was going into the dressing-room on a wheel-chair to get his attention in the dressing-room, so I asked him when he came back from there, I says, "Did that doctor in there say anything about fixing me up?" He says, "Yes, he spoke about you; he has got you to take care of yet."

Mr. CANNON.—Just a minute—

The COURT.—(Interrupting.) Sustain the objection.

Mr. JOHNSON.—Q. Tell what took place, not what any one not connected with the institution said. Tell what took place, what you did and what the attendants at the institution did.

A. Well, they didn't do nothing that day. That was the fourth day. And that afternoon I got into the wheel-chair that this foreman had, and I went looking for Dr. Mowers. I went down in the elevator from the third floor to the first floor and inquired from the girl in the office or lobby where Dr. Mowers was, and she said she thought he was around the building. I says, "Where is Dr. Argue?" She says, "He has gone down town." So I went around the building looking for Dr. Mowers. I didn't find him. I was in this wheel-chair all the time, wheeling myself around. So I came back to the office, and I says, "Where is Dr. Mowers, I can't find him?" She says, "Maybe he went down town." I came out in the corridor and I met Dr. Bell, and I asked him if he knew where the doctors was, and he says, "They both went down town."

(Testimony of James E. Carr.)

So I went back to my room. I saw there was no chance, so I went back to my room. The next morning Dr. Mowers come in and I asked him if he understood my condition. He says, "Yes." I says, "You mean to say, you understand my condition? I need some attention. I went three days once without any dressing, and it is the fifth morning now the second time." I says, "I am laying there rotting, and I have got to have a doctor." He says, "Do you want me, or Dr. Argue?" I says, "Either one suits me, as long as it is a doctor; I got to have some attention." So he says, "All right, I will look at your side myself this morning after I make my rounds." So I was still in the wheel-chair and I wheeled out in the corridor and I met this Dr. Eisen-graver, and he says to me, "Carr, as long as you are up come on in the dressing-room and I will fix your side in there." And I wheeled the chair into the dressing-room myself, and he says, "Can you get up on the table?" I says, "No, I ain't going to try to get on the table." So he says, "What did you come in here for," and started getting mad. He says, "I will tell you what I think of you; you questioned my ability as a doctor." I says, "No, I never did; you are mistaken." He says, "Yes, you did." I says, "No, I didn't; you haven't given me the opportunity yet." He says, "What do you mean?" I says, "You ain't a doctor." So I went out of the room, and he went out of the room, and I met Dr. Mowers a short time afterwards and he come up to me laughing, and he says, "What is the matter with

(Testimony of James E. Carr.)

you and Dr. Eisengraver?" I says, "Nothing, why?" "Oh," he says, "he just told me you stepped on his toes." I says, "That is as far as I could get in the condition I am now." He says, "Come on in the dressing-room, and I will fix you up." We went in the dressing-room and he put me on the table and started fixing up my side, and dressed there and cleaned it off and put me back to bed. But the side never seemed to get well after that, at all. Dr. Argue took care of me every day after that.

Q. Well, about twenty-one days elapsed before the bandage was removed and the wound ruptured, and then three days more before it was dressed the first time, and five days before it was dressed the second time?

A. The fifth day would be the second time.

Q. And then Dr. Mowers dressed it himself?

A. Dr. Mowers dressed it himself.

Q. Did Dr. Mowers say anything about the condition of your side at the time he dressed it?

A. No, never said a word about the side.

Q. How long did you remain at the hospital after that?

A. I remained up there close on to—I don't know just—close on to three months.

Q. What was the condition of the wound?

A. Oh, it kept discharging all the time—pus.

Q. Was it discharging pus when you left there?

A. Yes, sir.

Q. Did they discharge you from the hospital at the time you left there?

(Testimony of James E. Carr.)

A. They said I could go home; they thought maybe a change would do me good.

Q. Just tell us what happened after you went home. Did you go back to work?

A. No. I called in Dr. Johnson to take care of it then. He changed the dressing every day. Sometimes I would be able to go down to the office and sometimes he would come up, and he would take care of it. Finally, he says to me, "You better go back to the hospital and get that cleared up; that ain't going to heal on you." I says, "They seem to think it is over there." He says, "It ain't going to heal up; you better go back to the hospital and see what they think of it." So I went back to the hospital, and I spoke to Dr. Mowers about it—

Mr. CANNON.—(Interrupting.) When did you go back?

A. Oh, it was about a month afterward; I wouldn't say the exact dates or anything like that. I went back to the hospital and told Dr. Mowers that Johnson says somebody ought to go in there and clear that up, and he says, "That will come out all right, Carr, don't worry about it." So I stayed around the hospital a short time, and I wasn't no better or worse and I went back to Toppenish again, and Johnson, he started taking care of it again. He says, "What do you come back here all the time for? Why don't you make them fellows go in there and clear that up?" I says, "They seem to think it isn't necessary, it is going to heal itself." Johnson says, "You go back and tell them

(Testimony of James E. Carr.)

they got to go in there.” So I went back and I met Mowers and told him what Johnson says. “Oh,” he says, “Now, Carr, that will heal up.” I was only there at the hospital about a day that time, and I came back to Johnson, and it went along the same all the time after that.

Mr. JOHNSON.—Q. You lived in Toppenish at that time?

A. At the time. I asked Dr. Mowers if it would be all right for me to go to work, and he says Yes. So I went back to Toppenish and tried to go to work.

Q. Did you work then?

A. I made one trip from Toppenish to Ellensburg on a passenger train as flagman, and returned to Toppenish.

Q. What was your physical condition when you returned to Toppenish?

A. When I returned to Toppenish my side was running something fierce; it was all saturated; I just couldn't move.

Q. What time of the year was it, if you can remember?

A. Oh, I should judge, around in August; in the summer sometime.

Q. Then, how long did you stay in Toppenish?

A. I stayed in there until September.

Q. Of that year? A. Of that year.

Q. Where did you go from Toppenish?

A. To Pasco.

Q. Did you receive any treatment there from any company doctors?

(Testimony of James E. Carr.)

A. Yes, sir; Dr. O'Brien and Dr. Driscoll.

Q. Who were they?

A. They were company doctors at Pasco.

Q. What treatment did you get from them, if anything?

A. Oh, just about change the dressing is all and keeping the wound clean.

Q. Did you see Mowers at any time after that?

A. Why, I met him one day; he got off the train there at Pasco, and I asked him if he was going down town. He says, "Yes, I am going down to O'Brien's office." I says, "I want you to look at my side while you are down there." He says, "All right, I will take a look at it for you." So I went down to O'Brien's office and Mowers was there, and they examined me, and I says, "Why don't you go in there and fix that up?" "Oh," he says, "Carr, that will heal that quick," and he snapped his finger, "no use operating on that." I says, "That is an awful shape to be in if you can stop it." "Oh," he says, "that is going to heal, no use worrying your head about it."

Q. When was that conversation?

A. I should judge the latter part of 1913 or the fore part of 1914.

Q. Probably a year or so after the operation?

A. A year or so after the operation.

Q. How long did Drs. O'Brien and Driscoll continue to treat you then in Pasco?

A. Oh, they have treated me off and on until 1919; well, practically, O'Brien has been treating me since.

(Testimony of James E. Carr.)

Q. Did you ever consult any one else about the condition of your side?

A. I went to the Drs. Mayo, at Rochester.

Q. Who was with you when you consulted Drs. Mayo? A. Nobody the first time.

Q. What was said or done at the Mayo Hospital regarding this side of yours?

A. Why, they said they could fix it up with a little operation; says, "It has got to be cleared up."

Q. What year was that, do you remember?

A. That was in 1914.

Q. Did they fix it up?

A. Well, they examined me and got me all ready for the hospital, to be fixed up, and I caught a cold just as I was getting admitted to the hospital for an operation, and they told me they wouldn't operate on me until I got over this cough.

Q. What did you do then?

A. I returned to Pasco. I says, "No use being under this expense here, I may as well go home to Pasco and I will come back when I get rid of this cough."

Q. Did you consult Drs. Driscoll and O'Brien when you came back to Pasco? A. I did.

Q. Did you ever make any other visits to Rochester? A. I did, later on that year.

Q. What year was that?

A. Well, now, let's see: Well, it was that year or the next year, in the spring, something like 1915.

Q. And did you consult the Mayos at that time?

A. I did; yes.

(Testimony of James E. Carr.)

Q. Who was with you, if anyone, at that time?

A. Why, nobody was there, with me then.

Q. Did they operate at that time?

A. No, sir.

Q. What was said or done at that time?

A. They said it was turning into "TB," that I had to forget about the side for a while; "TB" of the lungs, the right and left lobe.

Q. And on account of that, they were unable to operate?

A. On account of that they says there would be no use to be operated on in this condition.

Q. What did you do then?

A. Well, prior to that, I went over to the N. P. hospital, before that.

Q. Before that; what year was that?

A. That was in 1914, before I made the second trip to the Mayos.

Q. What was said or done in the hospital at that time?

A. I went over there, and they diagnosed catarrhal bronchitis and cough and hay fever; they called it catarrhal bronchitis.

Q. They said you were affected with catarrhal bronchitis at that time? A. Catarrhal bronchitis.

Q. What else was said or done there?

A. Well, they was treating me for catarrhal bronchitis. Dr. Mowers came in one day, and he says, "You back again?" I says, "Yes." He says, "How is that side of yours?" I says, "The same as you left it." He says, "I will take a look at

(Testimony of James E. Carr.)

that this morning." He says, "Will you come down to my private office?" I says, "Yes, what time?" He says, "Nine o'clock." I went down to his private office, and I got up on the dressing-table, and Dr. Argue and Dr. Drough was in there, and Mowers looked at my side. He says, "I will fix that up for you in the morning." I says, "What's the idea? You understand what I am over here for, don't you? I got an awful bad cough." I had wrote to the Mayos in the meantime, and asked them if they had any objections to my going over to the N. P. to be operated on after I had been to them, and they told me "No, you can go over there if you want to." So Mower told me, "I will fix that side up for you in the morning." I says, "What's the idea 'in the morning'? I just come from Rochester and they told me they wouldn't operate on me on account of the cough." He says, "That's funny." I says, "Yes; what's the matter with letting me stay around two or three weeks and cure up this cough, and then if you want to operate go to it?" I says, "What do you want to operate to-morrow for?" He says, "Well, I am going away to-morrow." I says, "Where are you going?" He says, "I am going to Hayden Lake." "Well," I says, "I believe I will try and get rid of this cough before I let anybody operate on me; in fact I want the fellow that operates on me to stay on the job until I am well." "Well," he says, "That's all I can do for you." He says, "That is disgusting." That is the words he says. I says, "Yes, I understand it is,"

(Testimony of James E. Carr.)

I says, "it is worse than that." So he left the room and Argue fixed up my side and put the dressing on.

Q. Did you offer to stay there until you got over this cough? A. I offered to stay there.

Q. Just what language did Mowers use, if anything, when he left the room?

A. Well, he just said it was disgusting and left the room.

Q. Did he say anything about a further operation?

A. No, he didn't say anything about a further operation at the time.

Q. How long did you stay there at the hospital at that time?

A. Oh, I think I left the next day or two after something like that.

Q. Where did you go?

A. I went back to Pasco.

Q. Who treated you when you got back to Pasco?

A. I went to Drs. O'Brien and Driscoll.

Q. Now, then, you went to the Mayo Hospital in—

A. (Interrupting.) That is when I went to the Mayo Hospital and they diagnosed my case "TB," right and left lobes, they said.

Q. Do you remember what year that was?

A. It was 1915.

Q. Tell us what further treatment you received.

A. Well, they examined me there and told me I had to take a rest-cure, or something like that, and build up. They come right out flat-footed and told me it was "TB" and I had to take care of myself.

(Testimony of James E. Carr.)

So I built myself up for about a year or year and a half.

Q. You came back from Rochester to Pasco?

A. I came back from Rochester. I gained about thirty or thirty-five pounds.

Q. Who was treating you when you came back from Rochester the second time?

A. Dr. O'Brien.

Q. Did you make any other visit to Rochester?

A. Yes, sir, later on.

Q. In what year? A. 1918.

Q. Now, then, between 1918 and the last visit to the Mayos' hospital, did any other surgeon of the company examine you?

A. No, sir; aside of Dr. O'Brien; he was the company surgeon.

Q. And did you receive treatment from any one during that period of time excepting the company doctor there at Pasco? A. No, just Dr. O'Brien.

Q. Did you ever report for duty during any of this period? A. Yes, sir.

Q. When was that?

A. Oh, I have worked periodically off and on there whenever I would feel like it. I would make a trip and back, and I reported for duty and worked there, and I also reported once for some light work, but the superintendent didn't see fit to give it to me and we had some talk about that, and he says, "I can force you to take a medical examination."

Q. When was that, Mr. Carr?

Mr. CANNON.—I don't think it is material.

(Testimony of James E. Carr.)

Mr. JOHNSON.—It is preliminary to an examination that was actually made.

The COURT.—Well, get to the examination, then. The preliminary conversation has nothing to do with it.

A. He gave me an order and I went down to Dr. Hambly and he passed me to go to work.

Q. What year was that? A. 1915.

The COURT.—It seems to me if we wouldn't jump from one date to another we could get through quicker.

WITNESS.—I wouldn't say for sure; I don't know just exactly to that date.

Mr. JOHNSON.—Q. Was it after the second trip to Rochester?

A. It was after the second trip to Rochester. It was 1916, I can remember positive of that now.

Q. Who was Dr. Hambly that you reported to for examination?

A. He was the Northern Pacific doctor at Pasco.

Q. Did you go to work after that? A. Yes, sir.

Q. How long did you work?

A. Oh, I may have worked about two months, I believe; I don't know. I didn't work two months steady, but I worked off and on maybe six months. When I was able to make a trip I would go.

Q. That was in 1916? A. That was in 1916.

Q. Did you then return to the Mayo hospital for further treatment?

A. Yes, I went in March, 1918.

Q. What took place there?

(Testimony of James E. Carr.)

A. They decided to operate.

Q. Did they operate? A. They operated.

Q. What happened after that, where did you go?

A. Oh, I stayed around there two or three months, and I came back home and still been doctoring.

Q. You came back home? A. Yes.

Q. Who accompanied you back to Rochester in 1918, if anybody? A. Dr. H. B. O'Brien.

Q. Who sent him back there with you?

A. Why, I requested him.

Q. Who did you make the request to?

A. To him.

Q. Did Mowers or any of the surgeons of the Northern Pacific at any time operate on you the second time? A. No.

Q. What is the condition of your side at this time? A. It is discharging pus.

Q. Still discharging pus. What was your condition of health prior to this operation in 1913?

A. Considered pretty good—good.

Q. Had you been examined prior to that time by any of the surgeons of the company?

A. Before that?

Q. Yes. A. Yes, sir.

Q. Who?

A. Dr. H. M. Johnson, Toppenish.

Q. I show you Plaintiff's Exhibit 1, and ask you when that photograph was taken.

A. Taken at La Crosse, Wisconsin.

Q. When was that taken?

A. The summer of 1912.

(Testimony of James E. Carr.)

Q. The summer previous to this operation?

A. Previous to this operation.

Q. And who is that a picture of?

A. Myself, my wife and her sister.

Mr. JOHNSON.—We offer Plaintiff's Exhibit 1.

Mr. CANNON.—Objected to as immaterial.

Mr. JOHNSON.—For the purpose of showing his physical condition and appearance prior to the operation.

The COURT.—It will be admitted for what it is worth.

Whereupon, said picture, marked for Identification Plaintiff's Exhibit 1 was admitted in evidence, and is hereto attached and made a part hereof.

Mr. JOHNSON.—Q. I show you Plaintiff's Exhibit 2 and ask you where that photograph was taken.

A. Taken in Pasco, Washington.

Q. About when was that taken? A. 1915.

Q. Who is that a picture of?

A. Picture of myself, Kick, and I don't know the other party's name.

Mr. JOHNSON.—We offer Plaintiff's Exhibit 2 for the same purpose.

Whereupon, said photograph, marked for Identification Plaintiff's Exhibit 2, was admitted in evidence, and is hereto attached and made a part hereof.

Mr. JOHNSON.—Q. The one with the cross immediately over the head is your picture?

A. That is my picture.

(Testimony of James E. Carr.)

Q. I show you now Plaintiff's Exhibit 3 for Identification and ask you whose signature appears in that examination. A. It is my signature.

Q. Who made that out?

A. Dr. H. M. Johnson.

Q. Whose signature is this down here?

A. That is Dr. H. M. Johnson's.

Q. Who signed the examination?

A. He signed the examination.

Q. And you took the examination before him?

A. Before him.

Q. That examination was taken about the date that is given in the application?

A. At the date it was given.

Q. February 20, 1912? A. February 20, 1912.

Mr. JOHNSON.—We offer that portion of the exhibit here which is signed by Carr and Johnson.

Mr. CANNON.—It appears to be the Mutual Benefit Department of the Order of Railway Conductors of America and I object to it.

The COURT.—For what purpose was the examination made?

WITNESS.—That was for life insurance.

The COURT.—I will sustain the objection, then.

Mr. JOHNSON.—Note an exception.

Q. Had you ever been affected with tuberculosis prior to the operation you have complained of here?

Mr. CANNON.—It seems to me that is a question he can't very well tell.

The COURT.—Doctors very often disagree on

(Testimony of James E. Carr.)

that question and a layman knows nothing about it. I will sustain the objection.

Mr. JOHNSON.—Q. Now, Mr. Carr, is your mother living?

A. Yes, sir.

Q. Your grandmother living? A. Yes, sir.

Mr. CANNON.—Objected to as immaterial. Lots of people have ancient parents and still die in infancy.

The COURT.—Doctors disagree as to whether or not it is hereditary; sustain the objection.

Mr. CANNON.—And strike the answer please?

The COURT.—Yes.

Mr. JOHNSON.—Q. What was your physical condition just prior to this operation?

The COURT.—He said it was good.

Mr. JOHNSON.—Q. I show you Plaintiff's Exhibit 4 for Identification and ask you what that is?

A. That is Northern Pacific Benefit Association Constitution and By-laws.

The COURT.—Submit it to counsel on the other side and I suppose he will admit it if that is what it is.

Mr. CANNON.—I would like to know the date of it.

Mr. JOHNSON.—It is dated February 23d, 1916. I am going to offer statements from it, I am not going to offer the entire book.

Mr. CANNON.—Well, I suppose you ought to introduce it all and then call attention to those paragraphs, because those segregated paragraphs

(Testimony of James E. Carr.)

wouldn't explain the Constitution. I object to the paragraphs, but am willing the book shall go in and that he may read to the jury such portions as he may want to read.

Mr. JOHNSON.—I offer now Section 1 on Page 3; Section 1 on Page 4; Sections 7 and 8 on Page 6 and continuing with Section 8 on Page 7; Section 10 on Page 7; Section 1 on Page 9, and Subdivision B of Section 1 on Page 10.

Q. And is this a time-card furnished the conductors?

A. Furnished the employees—conductors, for the movement of trains.

Mr. JOHNSON.—We offer the part of that exhibit on Page 10 thereof under the caption "NOTE."

Mr. JOHNSON.—Q. Mr. Carr, has any physician examined you since you came to Walla Walla?

A. Yes, sir.

Q. Who examined you? A. Dr. Cropp.

Q. When did he examine you? A. Saturday.

Testimony of Dr. H. B. O'Brien, for Plaintiff.

Dr. H. B. O'BRIEN, called as a witness on behalf of the plaintiff having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. JOHNSON):

Q. Dr. O'Brien, where do you live?

A. Pasco, Washington.

Q. What is your business or profession?

A. Physician and surgeon.

(Testimony of Dr. H. B. O'Brien.)

Q. From what school are you a graduate?

A. University of Minnesota.

Q. What experience have you had in surgery?

The COURT.—Any question as to the doctor's competency?

Mr. CANNON.—Well, I don't know what his experience has been, but you needn't go into it but very briefly.

Mr. Johnson.—Q. State briefly, Doctor, what your experience has been.

A. Well, I graduated from the University of Minnesota, then I spent a year at St. Joseph's, St. Paul; then I went from there out to Montana and worked for the Billings & Northern Railroad; then I was surgeon in the Stillwater State's Prison for a year, and then I went to Tacoma 1908 to 1909—

Mr. CANNON.—(Interrupting.) What I wanted to know, he is licensed to practice in this state?

Mr. JOHNSON.—Oh, yes.

Q. You went to Tacoma. What were you engaged in at Tacoma?

A. I served as interne there for about eight or nine months, nearly a year.

Q. What hospital was that at Tacoma?

A. The N. P. B. A.

Q. You are licensed to practice medicine in the State of Washington? A. I am.

Q. Were you ever employed by the Northern Pacific or the Northern Pacific Beneficial Association? A. I was.

Q. And when was that?

(Testimony of Dr. H. B. O'Brien.)

Mr. CANNON.—State which one.

Mr. JOHNSON.—Q. Which one?

A. Well both of them, I think.

Q. When were you employed by them, Doctor?

A. From about 1908, October, to about 1919.

Q. How long did you continue in the employ of the company? A. Well, about five or six years.

Q. Do you know Mr. Carr? A. I do.

Q. When did you first meet Mr. Carr?

A. Oh, about 1914.

Q. Was that after he had been operated on?

A. It was.

Q. And in what capacity did you meet him?

A. As surgeon for the company.

Q. What condition did you find him in at that time?

A. Why, I found he had a rupture of his right side on the appendical region. At times that would close and again it would open. At times he would be up and around for a week or two and then he would be down in bed for a week or two, and it has been continuing that way for the last six or seven years.

Q. Did he advise you where he had received his treatment?

A. Yes, he told me where he had been operated on.

Q. Where was that?

A. In Tacoma, at the N. P. B. A. Hospital.

Q. Have you examined him, or were you ever

(Testimony of Dr. H. B. O'Brien.)

present when Dr. Mower made an examination of him in your office?

A. Yes, he examined him up there; I think it was in 1918.

Q. Whenever that examination was, who was present?

A. Dr. Driscoll was present at the time.

Q. Dr. Driscoll, yourself and Dr. Mower?

A. Yes, sir.

Q. How did you examine him?

A. Why, Dr. Mowers put him up on the table and examined the side. Carr was having a great deal of trouble at that time and wanted to know what he would do.

Q. Did Mowers say anything regarding his condition at that time?

A. He said he thought the condition would clear up all right; an operation wasn't necessary.

Q. He told Mr. Carr an operation wasn't necessary? A. Yes, sir.

Q. Did you ever accompany Mr. Carr to the Mayo Hospital at Rochester? A. I did.

Q. Do you remember about what year that was?

A. Well, the last year I went back with him the N. P. furnished me a pass and I wasn't working for them at all.

Mr. CANNON.—I move to have that stricken out.

The COURT.—Stricken.

Mr. JOHNSON.—That is, last year; that is, 1919, you went back? A. Yes.

(Testimony of Dr. H. B. O'Brien.)

Q. At whose request did you go back with him?

Mr. CANNON.—That is immaterial, if the Court please.

The COURT.—Sustained.

Mr. JOHNSON.—Q. How many times did you go back to Rochester with Mr. Carr?

A. Oh, I have been back there twice.

Q. With him? A. Yes.

Q. And when was the date or the year of the first visit back there?

A. Well, he went back, I think the first time—he was back last year and then the year before that.

Q. That would be 1918? A. Yes.

Q. Were you then surgeon for the companies mentioned here? A. No.

Q. And you went back with Carr?

A. Yes.

Q. You had been treating him off and on?

A. Yes.

Q. In 1918 did you have any connection with the companies or did they issue any orders for you to treat any person?

A. No, I wasn't working for them then.

Q. 1918? A. Yes; up to 1918.

Q. When did you sever your connection with the company?

A. I think it was the latter part of 1919.

Q. Latter part of 1918, or 1919? A. Yes, sir.

Q. What treatment did Mr. Carr receive at Rochester in 1918 when you were back there with him?

(Testimony of Dr. H. B. O'Brien.)

A. Well, that is the time Dr. Judd went in and removed a stump of the appendix.

Q. You were present at that operation?

A. No, I was not.

Mr. CANNON.—Then I move to have it stricken out.

The COURT.—The answer will be stricken. Confine yourself, Doctor, to matters of which you have personal knowledge.

Mr. JOHNSON.—Q. Were you present at any time when Mr. Carr was treated at Rochester?

A. I was present during several dressings when Dr. Judd dressed him, and also looked at several X-ray pictures that were taken.

Q. Taken by the doctors at the Mayo Hospital?

A. Yes.

Q. From whom did you receive orders when employed by these companies for the treatment of employes who became sick or injured?

A. Usually from the Chief Surgeon.

Q. Well, if someone working on the Pasco Division become sick or injured who issued the orders?

A. Generally got them from the superintendent's office if there was a wreck or anything.

Q. Superintendent of what company?

A. Of the N. P. Railway.

Q. And in case someone became sick while in the employ of the company there who would issue the order?

A. They would send up an order for me to take care of him.

(Testimony of Dr. H. B. O'Brien.)

Q. Who would sign that order?

A. Usually the agent.

Mr. CANNON.—The order being in writing, I think the writing itself would be the best evidence.

Mr. JOHNSON.—I am not relying upon any specific order; I am showing the custom.

WITNESS.—Sometimes they would have orders and sometimes they wouldn't. If it was an emergency they would take care of them without an order.

The COURT.—If there is any written order, the order itself is the best evidence of its contents.

Mr. JOHNSON.—Q. You received those orders from the superintendent's office at times and from the agent, and did any one else have authority to issue them?

A. Usually those were the ones that would issue them.

Q. While you were physician and surgeon for the companies at Pasco who would send a man over to the Tacoma Hospital if he needed treatment?

A. Usually the company doctor.

Q. As surgeon for the company did you treat any one except employes of the company?

A. Yes, if anybody was injured in a wreck as a passenger we would take care of him.

Q. As surgeon for the N. P. and N. P. B. A. at Pasco were you required to treat patients off from other lines? A. No.

Q. The S. P. & S. runs into Pasco; did you have instructions to treat them?

(Testimony of Dr. H. B. O'Brien.)

A. Well, I have always worked for the S. P. & S. since I have been in Pasco.

Q. Calling your attention now to this state of facts: Assuming that Mr. Carr has been sent by the company to Tacoma for an operation for appendicitis; an operation was performed for appendicitis and after the operation, some three weeks afterward the wound failed to heal, and it had been bandaged with adhesive tape, and that bandage was removed and a rupture occurred, pus was discharged and dressing were applied. Doctor, how often in your opinion would it be necessary to change those dressings?

Mr. CANNON.—That is objected to as incompetent, irrelevant and immaterial; no proper basis having been furnished to base an expert opinion upon; further, that it does not yet appear that the parties treating the plaintiff were in any manner connected with the Northern Pacific Railroad, nor that the Northern Pacific Railroad was in any manner responsible for their actions, it not being claimed that these surgeons were incompetent.

The COURT.—I will overrule the objection for the present. I don't know whether there is any testimony tending to show the wound failed to heal, but he may answer.

A. It depends altogether on the amount of pus that was discharged. Of course, you dress it enough to keep it clean and dry.

Mr. JOHNSON.—Q. From your experience with

(Testimony of Dr. H. B. O'Brien.)

such cases how often would you imagine that would be necessary?

Mr. CANNON.—That is objected to upon the ground the witness himself says it depends on the amount of pus being discharged and the condition of the wound.

The COURT.—He may answer.

A. Couple of times a day.

Mr. JOHNSON.—Q. In your opinion, would it be a proper method of treatment to allow that wound to go undressed from three to five days?

Mr. CANNON.—Objected to upon the same ground, and calling for a conclusion of the witness?

The COURT.—Overruled.

A. It wouldn't be proper treatment.

Mr. JOHNSON.—Q. Now then, Doctor, if you had performed an operation for appendicitis—perforated appendix—and the wound failed to respond to ordinary treatment and kept discharging pus for months afterwards, what would be the proper treatment to pursue when that condition was found to exist?

Mr. CANNON.—That is objected to upon the ground what he would do under the circumstances isn't the criterion.

The COURT.—I will sustain the objection on the ground it is not one of the grounds of negligence charged in the complaint.

Mr. JOHNSON.—Q. Doctor, if an operation had been performed for appendicitis and the wound failed to respond to the ordinary method of treat-

(Testimony of Dr. H. B. O'Brien.)

ment and would fail to heal, what would that indicate to you as a surgeon?

Mr. CANNON.—That, if the Court please, is immaterial, what it would indicate to him.

The COURT.—He may answer. I suppose he has reference to what it would indicate as to the original operation.

Mr. JOHNSON.—Yes.

A. Well, I would eventually look for some foreign substance or something that was down there to keep it from healing.

Mr. JOHNSON.—Q. In your opinion, would the failure to remove an infected portion of the appendix cause that condition?

A. It could cause it, yes.

Q. Would it be proper surgery when you discovered that condition to exist to remove that cause?

Mr. CANNON.—That is objected to; that isn't alleged.

The COURT.—I will sustain the objection.

Mr. JOHNSON.—Q. Assuming, Doctor, that an operation had been performed for appendicitis and the wound failed to respond to the ordinary method of treatment and failed to heal, what in your opinion would be the proper method of treatment?

Mr. CANNON.—That is objected to also as outside of the issues.

(Argument.)

The COURT.—You asked him what would be the proper method of treatment assuming a part of the infected appendix was left in there, and you have

(Testimony of Dr. H. B. O'Brien.)

failed to prove any part was left in there up to this time.

Mr. JOHNSON.—Q. Assuming an operation had been performed for appendicitis and the wound failed to respond to the ordinary method of treatment and failed to heal up, kept discharging pus, what would be the proper method of treatment?

A. Why, I would go in there and operate again and try to find out the cause of the trouble and cause of the discharge.

Q. If an operation had been performed for appendicitis, the appendix were removed and a rupture occurred, what would be the proper method of treatment of that rupture?

A. If it was a clean wound I would wait a reasonable length of time and repair that rupture.

Mr. JOHNSON.—You may cross-examine.

Redirect Examination.

(By Mr. JOHNSON.)

Q. Going back again to the question of tubercular infection. If a man had been treated and allowed to remain in the condition that has been shown here by the testimony would he be apt to become tubercular from that condition?

A. He would get it infected, yes, while there was a sinus there.

Q. Now you stated in response to Mr. Cannon's question that you would wait a reasonable time before you would operate again. Would you say six or seven years was a reasonable time?

A. No, I wouldn't.

(Testimony of Dr. H. B. O'Brien.)

Q. What would you consider a reasonable time before you would make the second operation?

A. In two or three months I would decide one way or the other, I think.

Q. What would be the result of failure to properly dress a wound that was discharging pus?

Mr. CANNON.—Objected to on the ground it is not within the issues.

The COURT.—I think it is within the examination, however; he may answer.

A. The *the* pus would probably become bagged and some area would be infected.

Q. Would it be apt to cause an infection?

A. It would infect more tissue.

Q. What would be the result of that upon a man's physical condition?

A. Well, he would absorb the pus, if the dressings weren't changed, into his system.

Q. If he would absorb the pus as you have stated, how would that affect his system.

A. Well, it would be a general weakened condition; weaken him physically.

Q. Referring to Mr. Cannon's cross-examination wherein he referred to the breaking away of these sutures when the bandages were removed. If the bandages were kept in place until the proper time according to approved methods of surgery, would those sutures be apt to come away?

A. Well, they might and they might not; it is hard to tell. The bandages would strengthen them, but they might come out anyway.

(Testimony of Dr. H. B. O'Brien.)

Q. What effect would a failure to dress as you have testified about here, have upon the abdominal wall and the lower part of the abdomen?

A. Tend to weaken it.

Q. How recently have you examined Mr. Carr?

A. Why, I generally called on him every day and have for the last five or six years.

The COURT.—That doesn't answer the question.

A. He came over here Saturday; I think Saturday.

Mr. JOHNSON.—Q. You examined him Saturday? A. Yes.

Q. What is his present physical condition?

A. Well, he has got a hernia of that right side with a discharging sinus.

Q. Is this discharging sinus from the vicinity of the appendix? A. It is.

Q. Would such a discharging sinus be caused by the retention of an infection in this cavity in the vicinity of the appendix?

A. It would be caused from infected tissue there.

Q. At the present time can you say whether or not Mr. Carr is permanently disabled?

A. I believe he is, yes.

Q. In your opinion he is? A. Yes.

Question. Doctor, you stated yesterday that you went back to Rochester with Mr. Carr in 1918. Who paid your transportation?

Mr. CANNON.—That is immaterial.

The COURT.—He may answer.

A. The Northern Pacific furnished me a pass. Northern Pacific Railway Co.

(Deposition of Dr. E. S. Judd.)

At this time I would like to have the deposition of Dr. Judd so that I might read it into the record.

Deposition of Dr. E. S. Judd read, leaving out the formal parts:

Deposition of Dr. E. S. Judd, for Plaintiff.

Q. State your name, residence and profession?

A. E. S. Judd, Rochester, Minnesota. Physician and surgeon.

Q. Do you know James E. Carr of Pasco, Washington, and if so, when did you first have occasion to meet him?

A. I first met J. E. Carr, 6/3/1915, I think. I recollect him, I do not know him except as a patient.

Q. Did you ever treat Mr. Carr in your capacity as a surgeon, and if so, at what time or times and for what ailment? State fully as possible.

A. I operated upon him March 4, 1918 for a sinus in the right iliac quadrant which was discharging pus. This sinus ran down to the ileocecal coil and old stump of the appendix. Apparently there was no definite communication with the intestinal tract at any point. This area of bowel was stitched over with plain catgut. The fistulous tract ran up behind the cecum into the muscles posteriorly, into a large pocket containing heavy granulation tissue.

Q. Upon examining Mr. Carr, what condition did you find him in physically and from a surgical standpoint? State fully.

A. In addition to the discharging sinus in his right inguinal region, we made a diagnosis of tuberculosis

(Deposition of Dr. E. S. Judd.)

in both upper lobes with a cavity in the left side; tubercle bacilli were found in the sputum.

Q. From your examination and treatment of Mr. Carr, what in your opinion was the probable cause of his condition? Please state fully and completely.

A. The discharging sinus for which we operated upon him came from the region of the appendix and may have come from retained infection in that region. It also came through the deep muscles of the back and may possibly have been tubercular in origin although no positive evidence of tuberculosis could be made out in the tissue removed at that time.

Q. What is your connection with the Mayo clinic and hospitals at Rochester, Minnesota?

A. Surgeon to the Mayo clinic, surgeon to St. Mary's Hospital and the Colonial Hospital. Member of the firm of Mayo, Plummer, Judd and Balfour.

Q. Was a record kept under your supervision and observation of the entry, treatment, findings and conclusion as to Mr. Carr's case at your institution? If so, kindly produce such records in full for identification and let copies be made and attach to your examination.

A. There was a complete record kept of his entrance and treatment. He was first examined in this clinic 6/3/15. At that time a diagnosis of a sinus in the right inguinal region following an appendectomy was made. There was also a ventral hernia, and also 9/17/15, an active pulmonary tuberculosis, and tubercle bacilli were found in the

(Deposition of Dr. E. S. Judd.)

sputum. He was sent home on that account. He was next seen 2/19/18. He had been on rest cure, had gained 35 pounds. The sinus had closed a year and a half ago and remained closed for three months. Since then it has been discharging pus, but no gas or no feces. Lately he has lost a good deal of weight again, has had a little cough. States that his sputum was examined three months ago elsewhere and that they found a trace of tubercle bacilli. We found no tubercle bacilli on this examination so on March 4, 1918, I performed the operation, detailed above. After this operation the sinus did not heal promptly and he was on treatment here and at home for a long time. We next saw him 7/12/19. He returned because of the continuance of this discharge from the sinus, stating that about once in 4 to 6 weeks an abscess forms and breaks with considerable drainage; ordinarily he had some discharge all of the time. No tubercle bacilli were found. Lumbar spine, right ilium and sacro-iliac joint and lungs were negative to the X-ray at that time. In spite of this, a diagnosis of tubercular sinus was made. He was put on Carrel-Dakin treatment and Bismuth paste.

Testimony of Dr. J. F. Cropp, for Plaintiff.

Dr. J. F. CROPP, having been called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

Question. You were not present in Court yesterday?

(Testimony of Dr. J. F. Cropp.)

Answer. No.

Q. Where do you reside?

A. Walla Walla.

Q. How long have you lived in Walla Walla?

A. Forty-four years.

Mr. CANNON.—I think I shall agree that he is a duly licensed physician and surgeon and is qualified—

The COURT.—As an expert?

Mr. CANNON.—Yes.

The COURT.—Proceed then.

Q. Dr. Cropp, do you know Mr. Carr, the plaintiff in this case? A. I have met him once.

Q. When was that? A. Last Sunday I think.

Q. Did you examine Mr. Carr at that time?

A. I examined him, not exhaustively.

Q. What condition did you find him in physically?

A. Well, I found him quite exhausted, somewhat emaciated, with what I would denominate multiple hernia of the abdomen around near the location of the appendix.

Q. If it was a fact that Mr. Carr had been operated on in 1918 for appendicitis and if it was a fact that the entire appendix and infected area around the appendix had been removed, would or would not the wound respond to ordinary treatment and heal?

Mr. CANNON.—That is not a proper question for the reason that not nearly all of the facts have been stated. It is not—

The COURT.—You may answer. You can bring out the rest of them.

A. Remove all of the infected material is a propo-

(Testimony of Dr. J. F. Cropp.)

sition that is pretty hard to determine. Should there be an appendicitis and the tissue around it infected and all such infection removed I see no reason why the wound would not heal if all were removed.

Q. Assuming, Doctor, that an operation for appendicitis had been performed and adhesive tape bandage had been applied to support the abdomen and that adhesive tape and bandage had been allowed to remain for a period of three weeks and that after a period of about three weeks this bandage was removed and a rupture occurred the night the bandage was removed and excessive pus was discharged, and it was a rupture as I stated, what would be the proper improved method of treating that rupture as soon as the rupture had been discovered?

A. Every case of surgery is a law unto itself, governed by such circumstances as we find the patient at the time. Under ordinary circumstances, barring any hidden and unknown infection should this be opened and drained and the abdominal wall closed with a sufficient drainage and kept in perfect condition as possible, there ought to be relief.

Q. What would you do with the rupture, how would you treat the rupture that had occurred; there were two incisions, one long one for the purpose of reaching the appendix and the other for drainage and the large incision had ruptured, how would you treat that rupture as soon as discovered?

A. If the abdominal wound had parted?

Q. Yes.

A. There might be some condition of the ab-

(Testimony of Dr. J. F. Cropp.)

dominal wound that might not heal readily under any circumstances, but I should, as before said, I should remove as much of the offending mass as possible and drain, holding the abdominal wound as close in approximation as possible.

Q. If the stitches had given away would you do anything toward replacing those stitches?

A. If I could not hold that abdominal wall any other way would use sutures.

Q. Now, assuming the same state of facts and assuming that the wound was not stitched or sutured after it had ruptured but dressing was applied, would you consider that dressing that wound in a pus case, once in three days and once in five days would be proper surgical treatment?

Mr. CANNON.—Same objection there. The facts testified to have not been proven.

The COURT.—Stated on one occasion three days—had alleged it four or five.

Mr. CANNON.—Three days and five days were very long afterwards; five days was very long afterwards.

Mr. JOHNSON.—No, immediately afterwards.

The COURT.—Answer the question, doctor.

A. I think the general law in surgery would be to keep the wound as clean as possible; taking into consideration your patient and surrounding conditions, but whether that dressing would be once a day or twice in a day or once in three or four days depends on the condition of the wound.

Q. If it was an open wound and pus was escaping

(Testimony of Dr. J. F. Cropp.)

so that it saturated the bed clothing and escaped around the bandage, then would a dressing from first after a period of three days and then after a period of five days be a proper treatment or should dressing have been oftener in that case?

A. The case is a criterion to go by; the point I would add it would be to keep that wound clean and as free from pus as possible. I mean now the abdominal wall into which the incision had been made.

Q. After an operation for a perforated appendix had been performed, according to improved methods of surgery, would there be any stump of an appendix remaining?

A. I can't imagine a case in which the usual method of inverting had been done there would be a stump; there might be a base, we invert the stump.

Q. Explain what you mean by inverting the stump?

A. That is the appendix, we usually run what is known as a purse string suture around the base of the appendix. The base of the appendix is setting on the gut; remove the appendix, catch it with the forceps, push it in the gut, bring the wall covered by peritoneum together so as to unite over and above, the appendix being hid in the cavity of the gut.

Q. Then the stump of the appendix would be inverted in the gut and there would be no stump remaining? A. There should not be.

Q. You examined Mr. Carr you say about Sunday, and you found him emaciated; what, in your

(Testimony of Dr. J. F. Cropp.)

opinion, is the cause of his present incapacity, his present condition?

A. I did not go into this case exhaustively, I did not examine his lungs, liver, kidneys, etc. I only observed the field of the operation and I took for granted that the long discharge from this wound, barring any other germ infection gave rise to the exhaustion. Barring any hidden and unknown infection that might be absorbed into the system that might also give rise to this condition, the discharge from this field, and the history of the case, that it had been discharging for a number of years, was sufficient cause for his exhausted condition.

Q. You examined the abdominal wall, just what did you find as to the abdominal wall as it now exists there?

A. Found it was pretty well honey-combed. Areas in this immediate locality in which the fascia was absent—probably had been absorbed and allowed the intestines to protrude through these openings, produced what I would denominate as multiple hernia—numerous places through which the intestines forced its way through these holes, the fascia absorbed.

Q. What effect would the retention of pus and the failure to keep the wound clean after operation have upon this abdominal wall?

A. The presence of pus is an evidence of destruction and thereby absorption of the retaining wall.

Q. Would that be responsible for a condition such as you found the abdominal wall of Mr. Carr in?

(Testimony of Dr. J. F. Cropp.)

A. I don't know that any incision had been made outside of those—externally, and I took for granted from what I found that it was through absorption—the integrity of the wall had been acted upon by pressure and absorption. I only found the condition of multiple hernia.

Q. Could tuberculosis be contracted from allowing an open wound such as has been described here to remain open in an ordinary room in a hospital?

A. It is possible.

Q. If a cure at this time could be effected of Mr. Carr's condition, what would be required to treat that fascia of the abdominal wound there from the standpoint of surgery?

A. The first thing I would do would make an effort to find the source from which this discharge of pus and granulating material was emanating and relieve that by some counter drainage. If I succeeded in doing this, then I would, it seems to me, every case however is a law to itself, but just what I could see and know without further investigation, it would occur to me that probably transplantation of fascia upon this abdominal site would offer some hope of recovery, provided always the drainage, counter drainage was established so as not to produce the same condition that was produced prior.

Q. You mention that you would try to remove the source of infection. Assuming you had a case such as you mention and it failed to respond and continued to discharge pus after a period of twenty-one days or six months, what would be the proper

(Testimony of Dr. J. F. Cropp.)

method of treatment with regard to attempting to locate that discharge cause or making a second operation?

A. A serious proposition, might require very heroic surgery.

Q. If you had the case originally in hand how long would you wait until you went into the abdomen again and—

Mr. CANNON.—The question is not what this doctor would do, but what good surgery would—

The COURT.—I think the doctor understands the question in that light.

A. Other things being favorable, there not being sustained condition that would be unfavorable, I should aim to make this counter drainage. If the patient was in such condition that I could do more harm in producing drainage that it would sap his life, would not do it.

Q. Assuming the patient was in condition to be operated on originally when you did operate and that you had one incision that had ruptured and another incision below this for drainage and the wound refused to respond to ordinary treatment, how long would you wait, assuming of course, you used proper and improved methods of surgery, how long would you wait before you went into there and attempted to remove the source?

A. In the first place would put him in the laboratory and determine first his blood pressure, would determine the condition of his heart, I would determine the condition of his kidneys, make a

(Testimony of Dr. J. F. Cropp.)

thorough examination of the lungs and take a blood count and if I found the white and red corpuscles favorable that is, the red corpuscles was anywhere about four to six million to the square under the microscope, and found the white corpuscles not beyond six to eight thousand in the same square; his blood pressure, as I said before, favorable reaching from 130 to 140 at his age, cu. cent. 140 to 160 and the recoil or the diastole two-thirds of this, I would consider the case favorable for operation and I should at once do it.

Q. In any event would you wait six or seven years to do it?

A. Not with this report. And I would like to add to this—I would be governed a little by the appearance of the red corpuscles—have found a number of cases where there is a sufficient number of red corpuscles but the corpuscle itself was degenerated—that would cut some figure with me in operation.

(To Mr. Carr.)

Q. I will ask you, Mr. Carr, to step forward so the doctor can explain what he means as to the abdominal wall. Remove the bandages.

Mr. CANNON.—If counsel desires to have the doctor examine him he can do so immediately after this.

The COURT.—I think he can explain sufficient for the purpose.

Mr. JOHNSON.—I want the jury to see the condition of his abdomen.

(Testimony of Dr. J. F. Cropp.)

Q. Now, doctor, explain what you have to do to that abdominal wall to restore it.

A. I spoke of multiple hernia. Here is one (indicating) here is another, there is another (indicating). There is a point, that would eventually be a hernia. Several of the points in the intestines below that is bulging out between the wall of the abdomen that is separating the fascia.

Q. Explain what you mean by fascia.

A. Covers over the abdomen, fibrous structure that covers the abdomen completely and *and* if a spot or point of it is destroyed allows the intestines to come through.

The COURT.—Any claim that the plaintiff is not incapacitated?

A. No.

The COURT.—Any claim that he can be cured by ordinary means?

Mr. CANNON.—We are rather in the dark on that.

Q. Where would you get the fascia?

A. From his thigh, bring it up and transplant it would offer a hope of recovery.

Q. When you say fascia you mean the muscle?

A. No.

Q. Muscular tissue?

A. No, fibrous tissue. No muscular tissue about it. Strong fibrous structure that I had referred to as removed from the thigh and stitched there to fascia that was solid.

Testimony of James E. Carr, for Plaintiff (Recalled).

JAMES E. CARR, having been recalled as a witness in his own behalf, further testified as follows:

Direct Examination.

Q. After your operation and after the rupture to your side, that has been spoken of here, was any examination made of your heart, blood pressure, blood or lungs? A. Not that I know of.

Q. You would have known of it? A. I would.

Q. Was an examination made? A. No.

Q. How often did Dr. Mower, the doctor who operated, see you after the operation?

Mr. CANNON.—There is no allegation that the doctor did not see him often enough.

Mr. JOHNSON.—The point is whether he should have come in.

The COURT.—Answer the question.

A. The first two or three days, every day, after that once or twice a week.

Q. How often after the rupture?

A. The day after the rupture they turned me over to Dr. Argue.

Q. How often did he see you, just once?

A. He may have seen me more than once.

Q. How often did he examine the wound?

A. Once.

Q. Mr. Cannon went into an operation you had some years ago for the removal of a testicle. Do you remember about when that was?

A. Don't exactly.

(Testimony of James E. Carr.)

Q. Was it before the operation to your side the first time? A. Yes.

Q. Did you fully recover from that operation?

A. Yes.

Q. And then he asked you if you had an operation for abscess in the side, if you had a drainage, that was when? A. About 1906.

Q. Did you fully recover from that? A. Yes.

Q. How long were you in recovering?

A. About four or five weeks. Five weeks at the most.

Q. Did that ever trouble you again? A. No.

Q. Then you had a fracture or broken bone. How long were you in recovering from that?

A. Was a kid then.

Q. You fully recovered from that? A. Yes.

Testimony of John Hays, for Plaintiff.

Mr. JOHN HAYS, having been called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Direct Examination.

Q. Where do you live? A. Pasco, Wash.

Q. What is your line of business?

A. Transfer business.

Q. Do you know Mr. Carr? A. I do.

Q. How long have you known him?

A. For about nine or ten years.

Q. Did you know him prior to the operation he had that has been mentioned here?

A. I did.

(Testimony of Mrs. Rice.)

Q. What was the condition of his health before that? A. I considered him a healthy man.

Q. About how much would he weigh?

A. I would judge probably 210 or 215 pounds.

Q. Work steady? A. He did.

Q. How far does he live from you at the present time? A. His house is 100 feet.

Q. In the same block? A. Yes.

Testimony of Mrs. Rice, for Plaintiff.

Mrs. RICE, having been called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination.

Q. Mrs. Rice, where do you live at the present time? A. Pasco, Wash.

Q. What relation are you to Mr. Carr?

A. His mother.

Q. Do you remember of an operation that Mr. Carr had in Minneapolis for abscess of the side.

A. Yes.

Q. Did he recover? A. He certainly did.

Q. Do you remember of the operation spoken of here where he had a testicle removed? A. Yes.

Q. He fully recovered? A. Yes, he did.

Q. You remember of his having a broken arm?

A. Yes.

Q. Fully recover from that? A. Yes.

Q. He had typhoid fever? A. Yes.

Q. Did he fully recover from that? A. He did.

Q. What was his physical condition prior to 1913?

A. Considered in good condition always.

Testimony of William A. Laidlow, for Defendant.

WILLIAM A. LAIDLLOW, having been called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination.

Q. State your full name?

A. William A. Laidlow.

Q. How old are you? A. Fifty-six.

Q. What is your business?

A. Secretary of the Northern Pacific Benevolent Association.

Q. How long have you been such secretary?

A. Twenty-six years.

Q. In other words, you have been connected with that Association practically since its inception?

A. No, it was in existence ten or fifteen years prior to that.

Q. What kind of an Association is this Northern Pacific Benevolent Association?

A. Voluntary Co-operative Association, taking care of the men, giving them medical and hospital care. Furnishes benefits in a great many cases.

A. These payments by the men are collected by the Railroad Company and turned over to the Association, and from that fund are paid the expenses of the hospitals, the salaries of the local surgeons, and all other expenses for care of the men.

Q. And the N. P. also gives some funds?

A. In addition to that the N. P. Ry. contributed \$25,000.00 a year. To-day they give \$50,000.00.

(Testimony of William A. Laidlow.)

Q. This organization was perfected what year?

A. 1882.

Q. And you have been with them 26 years?

A. Yes, sir.

Q. Do you know who organized the original company?

A. It was organized by the employees at that time by vote, and a board of directors selected and this constitution adopted at that time. I was not a member at that time and therefore can't testify as to that, but there has been practically very little change since then except the number of representatives has been changed.

Q. This report that you have offered here as Defendant's Exhibit "E," tells us that McKimberly was president. Who was McKimberly?

A. At that time he was Assistant to the President of the Northern Pacific Ry. Co.

Q. It gives Geo. T. Slade as First Vice-President. Who was he?

A. Second Vice-president in charge of the operation of the N. P. Ry. Co.

Q. Who was W. G. Johnston at that time?

A. He was Comptroller of the N. P. Ry. Co.

Q. What profit do the employees get out of the treatment received by passengers?

A. The claim department pay at rates for attendance at that point.

Q. Do they pay the regular rates to the surgeon on the ground?

A. No, they pay it to the Benevolent Association.

(Testimony of William A. Laidlow.)

Q. The surgeon does not get paid for taking care of those cases aside from his pay from the Benevolent Association? A. No.

Q. Is it or is it not a fact that all of the officers of the Northern Pacific Benevolent Association are officials of the Northern Pacific Railway Company?

A. At that time there were four of them.

Q. Who were they?

A. President, vice-president, comptroller and secretary-treasurer.

Q. For whom did you work prior to entering the service of the Northern Pacific Benevolent Association?

A. I was in the purchasing department of the N. P. Ry. Co.

Q. Assuming, now, that someone not an employee of the railway company, is injured in a wreck along the line, who takes care of that injured person?

A. The claim department.

Q. What doctor do they call?

A. Generally call the surgeon of the N. P. B. A.

Q. Then, where do they send him, if he needs hospital attention?

A. To the nearest hospital.

Q. Of the Northern Pacific Benevolent Association?

A. Any point where this man is injured he is generally taken care of and the claim department handles it.

Testimony of J. J. Maher, for Defendant.

J. J. MAHER, having been called as a witness on behalf of the defendant having been duly sworn, testified as follows:

Direct Examination.

Q. Your position?

A. Assistant Auditor of the Northern Pacific Railway.

Q. Do you have charge of the funds collected from the men for the Beneficial Association?

A. I did, up to March 1st of this year.

Q. Prior to that time, for a long time?

A. Yes, sir.

Q. Mr. Maher, how much of the money in operating these hospitals and paying these surgeons is used up in the treatment of accident cases outside of the employees who are contributing to this fund?

A. I can't answer that question because I don't know. I have nothing to do with the Northern Pacific Benevolent Association.

Q. What amount does the Northern Pacific Railway Co. contribute to the fund at the present time?

A. \$50,000 a year.

Q. What is that \$50,000 based on, how do they arrive at that figure?

Mr. CANNON.—If a man is injured on the road and the Benevolent Association takes care of him then the Railway Company pays the hospital for that particular service. The doctors are paid by the Railway Company.

(Testimony of A. M. Lee.)

Mr. JOHNSON.—That is an admission I am glad he made.

Testimony of A. M. Lee, for Defendant.

A. M. LEE, having been called as a witness on behalf of the defendant, and having been first duly sworn on oath, testified as follows:

Direct Examination.

Q. You are district claim agent of the Northern Pacific Railway Company? A. I am.

Q. How long have you been such agent?

A. Since twenty-five years.

Q. You have to do, have you, with persons who are injured as passengers or pedestrians, and also the trainmen? A. Yes.

Q. How are they treated?

A. By the N. P. authorized surgeons. We have surgeons for the Northern Pacific Benevolent Association, and they are also authorized surgeons for the Northern Pacific Railway Co., and in any case of a passenger being hurt the authorized surgeon is called if he is the first man that can be reached, otherwise we call any one that can be reached to render services to that person and the service is billed against the Northern Pacific Railway Company and that I direct to the surgeons. Same if they go to the hospital, the bill is paid by the Northern Pacific Railway Co. If they happen to be taken to the Northern Pacific Benevolent Association the bill is rendered by the N. P. Benevolent Association against the Railway Company and is paid by the Railway Company.

**Testimony of Dr. S. W. Mowers, for Defendant
(Recalled).**

Dr. S. W. MOWERS, having been recalled as a witness on behalf of defendant further testified as follows:

Direct Examination.

Q. When you were chief surgeon of the Northern Pacific Benevolent Association hospital at Tacoma, who hired you?

A. Northern Pacific Benevolent Association.

Q. When you say the Northern Pacific Benevolent Association hired you, what individual did you deal with in getting the employment?

A. What is known as the executive committee, Mr. A. Kimberly. Don't remember the names of the other two men on the committee.

Q. M. C. Kimberly? A. Yes, sir.

**Testimony of Dr. O'Brien, for Plaintiff (Recalled in
Rebuttal).**

Dr. O'BRIEN, having been recalled as a witness on behalf of plaintiff's rebuttal, testified as follows:

Direct Examination.

Q. Did you ever treat any strangers, not employees of the Northern Pacific Railway Company during the time you were surgeon for them?

A. Yes, a number that was injured along the line.

Q. Did you receive pay from the Northern Pacific Railway Company?

A. No, don't remember of ever receiving anything for them.

Q. The pay you received from the Northern Pacific Benevolent Association covered all your activities? A. Yes, sir.

In the District Court of the United States for the
Eastern District of Washington, Southern Division.

JAMES E. CARR,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Statement of Fact and Exception.

BE IT REMEMBERED, that the trial in the above-entitled cause, held on the 7th and 8th of June, 1920, the Honorable Frank H. Rudkin, presiding; both parties appearing by counsel; the jury having been impaneled, and the proceedings contained in the foregoing Statement of Facts duly had; that at the close of the testimony, as therein shown the defendant moved the Court for a nonsuit or an instructed verdict, which was granted, to which ruling the plaintiff then and there excepted on the ground that the evidence was sufficient to justify the Court in submitting the cause to the jury, exception was allowed, then and there entered in the minutes and subsequently preserved in the final judgment on the verdict, which was made June 21st, 1920, and entered June 22d, 1920, and the plaintiff

therefore prays that this Statement of Facts and exception be allowed and settled and signed.

CHAS. W. JOHNSON,
Attorney for Plaintiff.

The foregoing is allowed this 21 day of September, 1920, out of term.

FRANK H. RUDKIN,
Judge.

Plaintiff's Exhibit No. 4.

MEMBERSHIP.

Section 1. The membership shall include all employees of the Northern Pacific Railway Company.

MEMBERSHIP DUES.

Section 1. Members whose monthly salary is less than \$25.00.....\$.25 per month.

Members whose monthly salary or earnings is \$25.00 or over to be assessed on a basis of one (1) per cent of their monthly earnings, with a minimum deduction of 50 cents and a maximum of \$3.00 monthly.

Section 8. The Treasurer of the Northern Pacific Railway shall be elected Treasurer of the Association, and shall set apart in a special fund all assessments and contributions received from officers and employees of the Railway Company; deposit same in such bank as the Board of Managers may designate; hold, disburse and invest same under the direction of the Board of Managers.

Section 10. The Comptroller of the Northern Pa-

cific Railway shall be elected Comptroller of the Association, and will audit all accounts and report to the Board of Managers at least once a year and as often as required by the Board.

DATE OF MEMBERSHIP.

Section 1. All persons who accept service in the employ of the Northern Pacific Railway or Northern Pacific Beneficial Association shall from that date be considered as members of the Association, and entitled to its benefits, subject to the Constitution and By-Laws.

Plaintiffs' Exhibit No. 5,

NOTE.

SURGEONS will attend, when called officially, to all cases of **ACCIDENT** occurring to employees or passengers. In cases of **SICKNESS** it is the intention to limit medical service to the locality or town where a surgeon resides, unless some urgent necessity exists, for which distinct official authority must be had in accordance with established regulations.

RAILWAY OFFICIALS are required to call on the nearest authorized surgeons whenever practicable, when surgical or medical services are needed. When such are accessible, the Association will not be responsible for bills for medical services rendered by any other physician. In the event of a sudden emergency, arising from accident, if necessary

proper surgical aid should be procured until the arrival of a regularly appointed surgeon, when the case should be placed in his charge, and in no case should the services of any but an authorized company surgeon be continued at the expense of the Railway Company or of the Association after such surgeon is able to assume charge of the case.

BOARDING AND NURSING are furnished **ONLY AT OUR OWN HOSPITALS.** We are not responsible for bills incurred elsewhere unless specially authorized or approved by the Chief Surgeon, and then only in critical cases of injury or illness occurring in the discharge of duty.

Defendant's Exhibit "E."

OFFICERS

(Elected September 17th, 1913)

M. C. Kimberly	President.
Emerson Hadley	Vice-President.
W. A. Laidlaw	Secretary.
C. A. Clark	Treasurer.
H. A. Gray	Comptroller.

In the District Court of the United States for
the Eastern District of Washington, Southern
Division.

AT LAW No.—

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant in Error.

Assignment of Error.

Comes now, James E. Carr, plaintiff in error in the above-entitled cause, and in connection with his petition for writ of error in this cause, assigns as error the following ruling of the Court and proceedings had as appears in the record.

1.

The Court erred in not submitting to the jury the question of whether or not the Northern Pacific Beneficial Association was acting as the agent of the Northern Pacific Railway Company.

2.

The question of whether or not the Northern Pacific Beneficial Association was a charitable institution.

3.

The question of neglect on the part of the Northern Pacific Railway Company, and its allied institution and agent, the Northern Pacific Beneficial Association.

4.

The question of the amount of damage, if any, sustained by the plaintiff in error, through such neglect.

5.

The Court erred in instructing a verdict for the defendant in error on its defense as asserted.

First.—Because the evidence introduced by the plaintiff in error would be sufficient if uncontradicted to sustain a verdict.

Second.—Because such evidence was sufficient to cause reasonable men to differ as to the conclusion to be drawn therefrom, which rulings were excepted to at the time, and exception allowed by the Court.

WHEREFORE, Plaintiff in Error prays that judgment of said court be reversed, and that he be allowed to recover damages sustained.

CHAS. W. JOHNSON,

Attorney for Plaintiff in Error.

Filed Sep. 1, 1920. W. H. Hare, Clerk. By E. E. Wright, Deputy.

In the District Court of the United States for
the Eastern District of Washington, Southern
Division.

AT LAW No.—

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

Petition for Writ of Error.

TO THE HONORABLE FRANK H. RUDKIN,
Judge of the Above-entitled Court:

Comes now, James E. Carr, and by his attorney, Chas. W. Johnson, respectfully shows to the court, that on Tuesday the 8th day of June, 1920, the court directed a verdict against your petitioner, and in favor of the defendant, and ordered said cause dismissed, and your petitioner feeling himself aggrieved by said verdict and order as aforesaid, herewith petitions the court for an order permitting him to prosecute a writ of error to the Circuit Court of appeals of the United States, for the Ninth Circuit, under the laws of the United States, as in such cases made and provided.

WHEREFORE, your petitioner prays that a writ of error do issue in behalf of this plaintiff to the court aforesaid, sitting at San Francisco, California, in said Circuit, for the correction of said error complained of, and all errors appearing in said record, and that an order be entered fixing the amount of security to be given by the plaintiff, conditioned as the law directs, and upon giving bond in such form as may be required, his proceedings be suspended herein until the determination of said Writ of Error by the court aforesaid.

CHAS. W. JOHNSON,
Attorney for Plaintiff in Error.

Filed Sep. 1, 1920. W. H. Hare, Clerk. By E. E. Wright, Deputy.

In the District Court of the United States for
the Eastern District of Washington, Southern
Division.

AT LAW No.——

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

Order Granting Writ of Error.

The above-entitled matter having been presented to the court upon plaintiff's petition for writ of error, assignment of errors, and the record and files in said cause, and the court being fully advised in the premises.

IT IS THEREFORE ORDERED, That the said writ of error be, and the same is hereby granted, and the amount of bond required as security to be given by the plaintiff in error, be, and is hereby fixed in the sum of \$200.00.

Dated this 21st day of June, 1920.

FRANK H. RUDKIN,

Judge of Said Court.

Filed Sep. 1, 1920. W. H. Hare, Clerk. By E. E. Wright, Deputy.

In the district Court of the United States for the
Eastern District of Washington, Southern
Division.

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That we, James E. Carr as principal, and the Fidelity
and Deposit Company of Maryland, as surety, are
held and firmly bound unto the Northern Pacific
Railway Company, defendant in error, in the full and
just sum of \$200.00, to be paid to the said Railway
Company, its attorneys, successors or assigns, to
which payment well and truly to be made, we bind
ourselves, our successors or assigns, jointly and
severally by these presents.

Signed and dated this 25th day of August, 1920.

WHEREAS, lately at the regular term of the
District Court of the United States, for the Eastern
District of Washington, sitting at Walla Walla in
said District, in a suit pending and entitled as above
on the law docket of the said court, final judgment
was rendered against the plaintiff in error, dismissing
the plaintiff's cause with costs, and the said plain-
tiff has obtained a writ of error, and filed a copy
thereof in the Clerk's office in the said court, to re-

verse the judgment of the said court in the above suit, and a citation directed to the said Northern Pacific Railway Company, the defendant in error citing it to be and appear before the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, California, thirty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said James E. Carr shall prosecute said writ, to effect and answer all damages and costs, if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

JAMES E. CARR,

Plaintiff in Error,

By: CHAS. W. JOHNSON,

His Attorney.

FIDELITY and DEPOSIT CO. of MARYLAND,

By CHAS. W. JOHNSON,

Attorney-in-Fact.

[Surety Company Seal].

Approved this 10 day of September, 1920.

FRANK H. RUDKIN,

Judge.

Filed Sept. 18, 1920. W. H. Hare, Clerk. By E. E. Wright, Deputy.

In the United States Circuit Court of Appeals for
for the Ninth Circuit.

At Law No.—

JAMES E. CARR, .

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America,

To the Honorable Frank H. Rudkin, Judge of the
District Court of the United States for the Eastern
District of Washington, GREETING:

Because, in the record and proceedings, as also in
the rendition of the judgment which is in said Dis-
trict Court, before you, between James E. Carr,
Plaintiff in Error, and the Northern Pacific Railway
Company, a corporation, Defendant in Error, a man-
ifest error hath happened to James E. Carr, plain-
tiff in error, as by said complaint appears, and we
being willing that error, if any hath been, should be
corrected, and full and speedy justice done to the
party aforesaid in this behalf, do command you, if
judgment be therein given, that then under your seal,
you send the record and proceedings aforesaid, with
all things concerning the same, to the United States
Circuit Court of Appeals for the Ninth Circuit, to-
gether with this writ, so that you have the same at

San Francisco, in the State of California, where said court is sitting, within thirty days from date hereof, to the end that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error, according to the laws of the United States, as should be done.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

Citation on Writ of Error.

To the Northern Pacific Railway Company, and to
Edward J. Cannon, your attorney, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, thirty days from and after the date of this citation, pursuant to a Writ of Error filed in the Clerk's office of the above-entitled court, wherein James E. Carr is the plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the directed verdict and judgment rendered against the said plaintiff in error, as in said writ of

error mentioned should not be corrected, and why speedy justice should not be done the party in that behalf.

WITNESS, the Honorable Frank H. Rudkin, Judge of the United States District Court for the Eastern District of Washington, this 18 day of Sept, 1920.

FRANK H. RUDKIN,
Judge.

Filed Sep. 25, 1920. W. H. Hare, Clerk. By E. E. Wright, Deputy.

Copy received of the within Citation this 30th day of September, 1920.

E. J. CANNON,
Attorney for Defendants.

In the United States Circuit Court of Appeals for
for the Ninth Circuit.

At Law No. 3587.

JAMES E. CARR,
Plaintiff in Error,
vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Defendant in Error.

Clerk's Instructions for Printing Record.

To the Clerk of the Above-entitled court:

You will please take notice that the plaintiff in error relies upon the error committed by the trial

court in refusing to submit the issues raised by the evidence to the jury, and that in accordance with Section 8 of Rule 23, the plaintiff in error believes that it will be necessary for that portion of the record hereinafter specified, and that such portions of the record only be printed.

1. The complaint as appears on pages 1 to 3 inclusive of the Clerk's transcript.

2. The answer as appears at pages 11 and 12 of the Clerk's transcript.

3. That portion of the reply appearing on the first half of page 14, eliminating the verification.

4. The Court's instructions for verdict, the ruling and exception as contained on page. 111 of the bill of exceptions.

5. The verdict as contained on page 15 of the Clerk's transcript.

6. Judgment appearing at page 16 of the clerk's transcript.

The plaintiff in error deems a portion of the bill of exceptions necessary to the consideration of the Court's ruling, and you will therefore print the following portion of said bill of exceptions:

Page 2, from lines 1 to 16, and from 27 to 30 inclusive.

Page 3, Lines 9 to 13; 18 to 26, and all of Defendant's Exhibit "A" attached thereto and referred to in Line 26; except paragraph 17, and Lines 30 to 32 inclusive, page 3.

Line 1 and Lines 18 to 32 inclusive, page 4.

Lines 1 to 4 and 21 to 32, page 5.

All of page 6 to 23 inclusive.

Lines 1 to 17 inclusive, page 24.

Lines 5 to 9 and 27 to 32, page 25.

Line 1, page 26.

Pages 34 to 41 inclusive.

Lines 1 to 5, page 42.

Lines 17 to 32, page 52.

All of page 53; lines 1 to 16, page 54.

Lines 8 to 17, page 56.

Pages 59 and 60.

Lines 1 to 16, page 61.

Pages 62 to 70, inclusive, and line 1, page 71.

Page 80 and Lines 1 to 4, page 81.

Lines 9 to 30, page 84.

Lines 9 to 29, page 86.

Lines 17 to 32, page 87, and Lines 1 to 17, page 88.

Lines 1 to 18, page 91.

Lines 18 to 22, and 27 to 30, page 92.

Lines 7 to 9, page 93.

Lines 11 to 32, page 95.

Lines 15 to 23, page 96.

Lines 1 to 22, page 97.

Lines 1 to 14, page 98.

Lines 3 to 14, page 99.

Lines 8 to 18, page 101.

Lines 1 to 15; 25 to 32, page 102; and 1 to 8, page 103.

Lines 7 to 15, and 26 to 30, page 107.

Lines 1 and 2, page 108.

Lines 16 to 32, page 109.

Lines 1 to 3, page 110.

All of page 112.

Also the following portions of plaintiff's Exhibit 4:

The first 2 lines of Article 2, page 3; the first section of Article 3, page 4; Sections 8 and 10, Article 6, pages 6 and 7; Sec. 1, Article 1, of By Laws, page 9.

That portion of plaintiff's "Exhibit 5" found at page 10, under the heading "note" referring to surgeons, railway officials, boarding and nursing, being the upper half of said page 10, eliminating therefrom the list of surgeons.

The list of officers under the heading entitled "officers" on the first page of defendant's Exhibit "E."

You will further print the following proceedings had on appeal:

Assignments of error 17 and 18, clerk's transcript.

Petition for writ, page 19, clerk's transcript.

Order granting writ, page 20, clerk's transcript.

Bond, pages 21 and 22, clerk's transcript.

Writ of error, pages 22 and 23, clerk's transcript.

Citation in error, page 25, clerk's transcript.

Or so much of such appellate proceedings as may be deemed necessary or proper under your custom, and all other portions of the certified record will be omitted.

CHAS. W. JOHNSON,
Atty. for Plaintiff in Error.

Copy received of the within instructions for printing record is hereby admitted this 5th day of Oct. 1920. E. J. Cannon and F. J. McKevitt, attorneys for defendant in error.

[Endorsed]: No. 3587, United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 13, 1920. F. D. Monckton, Clerk.

[Endorsed]: No. 3587. United States Circuit Court of Appeals for the Ninth Circuit. James E. Carr, Plaintiff in Error, vs. Northern Pacific Railway Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Southern Division.

Filed October 13, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Transcript of Record.

DESIGNATED BY COUNSEL FOR DEFENDANT
IN ERROR.

Upon Writ of Error to the United States District
Court of the Eastern District of Wash-
ington, Southern Division.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

AT LAW—No. 3587.

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

**Affidavit of Edward J. Cannon in Support of Appli-
cation for Order for Printing Additional Tran-
script of Record.**

State of Washington,
County of Spokane,—ss.

EDWARD J. CANNON, being first duly sworn, says: That he is one of the attorneys for the defendant in error in the above-entitled action; that the plaintiff in error in said cause now contends that the defendant in error and the Northern Pacific Beneficial Association were both negligent in the employment of the surgeons and assistants to said surgeons who operated on the plaintiff in error and cared for him; that plaintiff in error has omitted from his transcript of record all testimony relating to that subject; that he has also omitted from said transcript his stipulation and admission made upon the trial that no claim was made that any surgeon or assistants thereto were in any way incompetent; that it now becomes important, in order that the Court

of Appeals may have before it the stipulations, admissions and evidence which justified the court below in granting defendant in error's (then defendant) motion for a directed verdict, that same shall be printed, and this application is made for the purpose of securing an order for the printing of the stipulations, admissions and evidence following:

The cross-examination of the plaintiff beginning at the bottom of page 28 and extending to line 15 on page 33 of the Statement of Facts;

That portion of the cross-examination of Dr. O'Brien contained on page 57 of said Statement;

That portion of the testimony of William A. Laidlow beginning on page 91 and ending on line 9 of page 95 thereof; and that portion of said testimony beginning at line 23, page 96, and ending at line 14, page 97;

That portion of the testimony of J. J. Maher beginning at line 15, page 98, and on to the bottom of said page, and beginning at line 15, page 99, and ending with "Witness excused";

That portion of the testimony of the witness Benton beginning at line 1 and ending at line 17, page 105, and beginning at line 1 and ending at line 25, page 106;

That portion of the testimony of Dr. S. W. Mower, beginning at line 12 and ending with line 25, page 107, and beginning at line 8 and ending at line 16, page 108, and

Memorandum of Court below of September 21st, 1920.—under and pursuant to Rule 23 of the Rules of the United States Circuit Court of Appeals, and in ac-

cordance with paragraph 1395 of Barnes' Federal Code of 1919.

EDWARD J. CANNON.

Subscribed and sworn to before me this 14th day of January, 1921.

[Seal] ORVILLE W. DUELL,
Notary Public for Washington, Residing at Spokane,
Washington.

[Endorsed]: No. 3587. United States Circuit Court of Appeals for the Ninth Circuit. James E. Carr, Plaintiff in Error, vs. Northern Pacific Railway Co., a Corporation, Defendant in Error. Affidavit of Edward J. Cannon, in Support of Application for Order for Printing Additional Transcript of Record. Filed Jan. 18, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the
Ninth Circuit.

AT LAW—No. 3587.

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

**Order Granting Application of Defendant in Error
for Printing of Additional Transcript of
Record.**

It appearing to the Court that the Transcript of

Record printed in the above-entitled action and filed in this court does not contain the stipulations, admissions and testimony made and introduced upon the trial of the cause which are important and necessary for the Court of Appeals to have before it in considering the questions now raised by the plaintiff in error herein and defendant in error, it is therefore—

ORDERED, That an additional Transcript of Record be printed and filed in said cause in this court of Appeals, containing the following portions of the record upon the trial:

The cross-examination of the PLAINTIFF beginning at the bottom of page 28 and extending to line 15 on page 33, of the Statement of Facts;

That portion of the cross-examination of DR. O'BRIEN contained on page 57 of said Statement;

That portion of the testimony of WILLIAM A. LAIDLOW beginning on page 91 and ending on line 9 of page 95 thereof; and that portion of said testimony beginning at line 23, page 96, and ending at line 14, page 97;

That portion of the testimony of J. J. Maher beginning at line 15, page 98, and on to the bottom of said page, and beginning at line 15, page 99, and ending with "Witness Excused."

That portion of the testimony of the witness BENTON beginning at line 1 and ending at line 17, page 105, and beginning at line 1 and ending at line 25, page 106;

That portion of the testimony of DR. S. W. MOWER beginning at line 12 and ending with line 25, page 107, and beginning at line 8 and ending at line 16, page 108; and memorandum of Court of September 21st, 1920.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. 3587. United States Circuit Court of Appeals for the Ninth Circuit. James E. Carr, Plaintiff in Error, vs. Northern Pacific Railway Co., a Corporation, Defendant in Error. Order Granting Application of Defendant in Error for Printing of Additional Transcript of Record. Filed Jan. 18, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Excerpt from Cross-examination of James E. Carr.

Q. When you entered the service of the Northern Pacific you understood, did you not, that the employes of the Northern Pacific Railway were members of an organization known as the Northern Pacific Beneficial Association? [28]

A. Well, I signed something to that effect, I believe, in the application.

Q. Well, I will read at this time a portion of the exhibit, which is Exhibit "A." "21. Do you understand that you are required to become a member of the Northern Pacific Beneficial Association upon entering the service of the Northern Pacific Railway, and do you assent to that Association' rules and

(Testimony of James E. Carr.)

monthly deductions from your salary for this purpose? Yes.” You remember writing the word “Yes” in your application? A. Yes, sir.

Q. Now, at that time I believe Mr. Shannon was trainmaster, was he not? A. Yes, sir.

Q. And he examined you also on the Book of Rules? A. Transportation rules.

Q. And the transportation rules of the Northern Pacific are contained in a book that you trainmen carry with you, do you not?

A. We did at times; we had access to them.

Q. And it was incumbent upon you and it was your duty, and you did study those rules?

A. I studied those rules.

Q. I call your attention to a book marked Defendant's Exhibit “B” and to page 145 of that book, and ask you if that is the Beneficial Association to which you refer. A. I believe it is.

Q. What? A. Yes, sir.

Q. You were familiar with those rules, were you not, when you joined the company's employ?

A. Not when I joined them, but after I joined them.

Q. Quite soon afterwards? [29]

A. We aren't furnished one of those books until after we are employed.

Q. But anyway, between 1908 and prior to 1913, you did become familiar with them?

A. I did become familiar with them; yes, sir.

Q. Your monthly dues were paid from time to time? A. They were deducted.

Mr. CANNON.—I offer page 145 in that book, and

(Testimony of James E. Carr.)

that will cover pages, 146, 147 and 148, down to "First Aid to the Injured."

Mr. JOHNSON.—There is no objection.

WHEREUPON, said pages 145, 416, 417 and 148 of book marked Defendant's Exhibit "B" for Identification, were admitted in evidence and are hereto attached and made a part hereof.

Mr. CANNON.—Q. Now, turning to the Northern Pacific Beneficial Association Constitution and By-laws which have been introduced in evidence. You became familiar also with these? A. No, sir.

Q. Well, let's see if you didn't. From year to year the officers of the Beneficial Association were elected, were they not? A. Yes, they were elected.

Q. One man from the conductors?

A. A representative from each organization; yes, sir.

Q. And you helped elect them, didn't you?

A. Yes, sir.

Q. That is, you voted from year to year to elect the officers?

A. Sometimes I voted and sometimes I didn't.

Q. And every year you voted as to whom should be elected as officers of that association? A. Yes, sir.

Q. So that you were quite familiar with the fact that the employees of the Northern Pacific were all members of the Northern [30] Pacific Beneficial Association?

A. Well, the way I understood it there was a representative of our organization to the association.

(Testimony of James E. Carr.)

Q. You knew there was also a representative of the engineers and firemen?

A. Every branch had a different representative.

Q. Shopmen and trackmen. A. Trackmen.

Q. General office employees.

A. I don't know anything about those.

Q. As well as conductors and brakemen?

A. Conductors and brakemen I know.

Q. Mr. Carr, this Dr. Johnson that you speak of in Toppenish was one of the surgeons of the Northern Pacific Beneficial Association, was he not?

A. Well, we always classed them as Northern Pacific doctors, that is the way we call them.

Q. But that is the fact, he was the doctor for the Beneficial Association?

A. That is what they say, "Northern Pacific doctor"; I don't know.

Q. And Dr. O'Brien, until he left the service, was so engaged? A. So engaged.

Q. And Dr. Mowers in charge of the hospital in Tacoma was so engaged? A. Yes, sir.

Q. And all of the others, Dr. Argue and Bell and all of them? A. I presume so; yes.

Q. That hospital that you speak of in Tacoma is the Northern Pacific Beneficial Hospital where all you men went when you were hurt or sick?

A. Why, some of them didn't go. [31]

Q. Well, they could if they wanted to; that is true, isn't it?

A. Yes, that is true; they had the option of going.

(Testimony of James E. Carr.)

Q. And they paid for it by deductions out of their salary? A. Yes.

Q. And that association, you know, was and is a corporation?

A. Well, all I know is just what they say. I never paid much attention to it. I know we had to pay the benefits; they was deducted.

Q. And the Northern Pacific Beneficial Association selected its doctors; you know that, don't you?

A. I don't know who selected the doctors.

Mr. CANNON.—Then I will offer in evidence the Constitution and By-laws, not only the part read by counsel or marked by counsel, but the entire book.

The COURT.—Very well.

Mr. JOHNSON.—As to that we make the objection that it is incompetent, irrelevant and immaterial. If there was no relationship existing between him and the Beneficial Association it is entirely immaterial, and that is the ground of my objection.

The COURT.—I will admit it upon the ground that you offered a part.

Mr. CANNON.—Q. Mr. Carr, you went to the hospital, you say, in 1913; do you remember who directed you to go?

A. Dr. H. M. Johnson of Toppenish.

Q. And then you had appendicitis?

A. Appendicitis.

Q. The operation was performed by whom?

A. Dr. Mowers.

Mr. CANNON.—Is it claimed, Counsel, that Dr. Mowers isn't a competent surgeon?

(Testimony of James E. Carr.)

Mr. JOHNSON.—No, sir. [32]

Mr. CANNON.—Or Dr. Argue?

Mr. JOHNSON.—No, sir.

Mr. CANNON.—Or Dr. Bell?

Mr. JOHNSON.—I don't know of Dr. Bell.

Mr. CANNON.—Is there any claim that the hospital surgeons were incompetent?

Mr. JOHNSON.—No, I don't think I have alleged they are incompetent.

The COURT.—Under the allegations of the complaint there are three acts of negligence charged; one refers to the operating surgeon, who was Dr. Mowers, the second also refers to the same practically, and the third refers to the removal of the bandages.

Mr. JOHNSON.—In other words, it is an action for negligence and not one for incompetence or anything of that kind. [33]

Excerpts from Cross-examination of Dr. H. B. O'Brien.

Q. You were attempting to correct your testimony relative to Dr. Mowers. Is it not a fact that the time he examined the plaintiff at the office of yourself and your partner, that you testified to yesterday as being in 1918?

A. I think I was wrong; I think it was probably 1916 or 1917.

Q. It was prior to 1918? A. Yes.

Q. And during the time you were one of the surgeons under him? A. Yes, it was.

Q. You came out west as an interne in the Associa-

(Testimony of Dr. H. B. O'Brien.)

tion Hospital at Tacoma? A. I did.

Q. And after serving there awhile you located in Pasco? A. Yes.

Q. Is it not a fact that Dr. Mowers named you as local attorney at Pasco? A. Yes, sir.

The COURT.—He so testified.

Q. When you were employed as such surgeon you were familiar with the constitution and by-laws of Northern Pacific Beneficial Association?

A. Not all of them; I read them when I first went over there I think, that was all.

Q. You understood it to be a fact that the contributions of these men from month to month is turned in afterwards to the Northern Pacific Beneficial Association? A. I think so.

Q. Turned over by the Railway Company to the Association? A. Yes, sir. [57]

Excerpts from Testimony of William A. Laidlow, for Defendant.

WILLIAM A. LAIDLOW, having been called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination.

Q. State your full name?

A. William A. Laidlow.

Q. How old are you? A. Fifty-six.

Q. What is your business?

A. Secretary of the Northern Pacific Benevolent Association.

Q. How long have you been such secretary?

(Testimony of William A. Laidlow.)

A. Twenty-six years.

Q. In other words, you have been connected with that Association practically since its inception?

A. No, it was in existence ten or fifteen years prior to that.

Q. As secretary you have charge of the books of that association and of its records? A. Yes.

Q. Can you refer to the record for the year 1913 at the time this gentleman was operated on in the hospital? A. Yes.

Q. You also print these records and mail them out each year? A. Yes, sir.

Q. I hand you a book which is called the Thirty-first Annual Report of the Northern Pacific Benevolent Association for the year 1913, and ask you if that is one of the books published by your Association.

A. Yes, we issue several thousand of these and they are issued over the entire line. [91]

Q. What period is covered?

A. Fiscal year ending June 30, 1913.

Q. One year? A. Yes.

Q. And these reports are delivered to the men and officials and all that?

A. For general information of all.

Mr. CANNON.—I want to have that marked.

Q. Mr. Laidlow, that is taken from the original records of the company? A. Yes.

Q. And is a true copy? A. Exact copy.

Q. What kind of an Association is this Northern Pacific Benevolent Association?

A. Voluntary Co-operative Association, taking care

(Testimony of William A. Laidlow.)

of the men, giving them medical and hospital care. Furnishes benefits in a great many cases.

Q. How much of it is shown by the by-laws?

A. The only thing is now shown in that book it does not show that all collections made from the men that every penny goes to this association.

Q. Can bring that out by questions. What is the fact?

A. These payments by the men are collected by the Railroad Company and turned over to the Association and from that fund are paid the expenses of the hospitals the salaries of the local surgeons and all other expenses for care of the men. [92]

Q. Does the Railway Company take or derive any of the money?

A. Absolutely none. Makes collections without any charge; provided in the beginning with hospitals at Missoula and —, and provides transportation and assists in a great many ways in making this a success where it would probably show a deficit each year.

Q. And the N. P. also gives some funds?

A. In addition to that the N. P. Ry. contributed \$25,000.00 a year. To-day they give \$50,000.00.

Q. Never derive any benefit?

A. Never received any compensation from the association.

Mr. JOHNSON.—This is objected to as calling for a conclusion.

Mr. CANNON.—Question of fact.

Q. Receive any money from it? A. None.

(Testimony of William A. Laidlow.)

Q. Where do you get your money, from—where does it reach you?

A. Money is collected by the Railway Company by deducting from the payrolls and Mr. Myers gives me a statement every month of the statement so collected at his office, makes a check for that amount payable to the Association which is turned over to our treasurer and placed in that fund. I have the original reports of Mr. Myer for that year.

Q. Then this is a duplicate original of the report?

A. That is the original itself made that year.

Q. Shows all the moneys collected and paid in to the Association? A. Yes, sir.

Q. And all of it appears to have been turned over. And these are the original records showing that fact?
[93] A. Yes, sir.

Mr. JOHNSON.—There is no dispute about that.

Q. How are the managers elected?

A. Elected by popular vote. At that time every two years. Now they are elected every four years.

Q. And from what different branches are the managers elected?

A. From the various branches of the service; conductors, brakemen and so on down.

Q. I will ask you then another general question, who selects the surgeons along the line?

A. The chief surgeon.

Q. Who was he then?

A. At that time Dr. Mowers.

The COURT.—How is he selected?

A. By the President and Board of Managers of the

(Testimony of William A. Laidlow.)

Association. And he selects his subordinates.

Q. Does the N. P. have anything to do with his selection? A. Nothing.

Q. Or any of his employees?

A. Nothing whatever.

Mr. CANNON.—I will offer in evidence Defendant's Exhibit "F" for identification which contains more in detail the information which the witness has testified to.

Mr. JOHNSON.—Objected to.

Overruled. [94]

Q. Mr. Laidlow, this report (Defts. Ex. "F"), that you have referred to here, is made up by the Northern Pacific Railway Company; not only a report of moneys collected but a complete report of what?

A. Refers to funds received from employees of the general office and operating department on the Eastern District Yellowstone, central and western districts—moneys deducted from employees at the various points in those districts.

Cross-examination.

Q. It does not show the amount contributed by the N. P. Ry. Co.?

A. No, simply the amounts deducted by the employees. [95]

A. No.

(Witness excused.) [96]

Q. Is it or is it not a fact that all of the officers of the Northern Pacific Benevolent Association are officials of the Northern Pacific Railway Company?

A. At that time there were four of them.

(Testimony of William A. Laidlow.)

Q. Who were they?

A. President, vice-president, comptroller and secretary-treasurer.

Q. For whom did you work prior to entering the service of the Northern Pacific Benevolent Association?

A. I was in the purchasing department of the N. P. Ry Co.

Q. Assuming now that someone not an employee of the railway company, is injured in a wreck along the line, who takes care of that injured person?

A. The claim department. [97]

Excerpts from Testimony of J. J. Maher, for Defendant.

Q. Do you know if it is a fact that all the moneys collected from the employees, after deducting from their pay, is turned over to the Association?

A. It is.

Q. You hold receipts for it all from the Association? A. I do.

Q. And that has been and was the fact during 1913 and ever since? A. It is.

Q. Does the Northern Pacific Ry. Co. receive a dollar of profit out of these moneys?

A. No, sir.

Q. Does it even charge for keeping a record of it?

A. It does not.

Q. Turned over fully without deducting their charge? A. Yes. [98]

A. We started in, I believe, with \$15,000.00 and the

(Testimony of J. J. Maher.)

Association was running behind and on a showing made the President increased it from time to time. It was increased from time to time according to the requirements of the Association.

Q. And the amount deducted from the employees has increased?

A. Increased very little. Increased and decreased.

(Witness excused.) [99]

Excerpts from Testimony of Mr. Benton, for Defendant.

Mr. BENTON, having been called as a witness on behalf of defendant and having been duly sworn, testified as follows:

Direct Examination.

Q. You are claim agent for the N. P. Ry?

A. Yes, sir.

Q. Your son is also claim agent for the company?

A. Yes, sir.

Q. What is the fact as to whether or not the N. P. Benevolent Association surgeons when employed to treat strangers are paid for the services performed on these strangers?

A. Within my experience they have always been paid in every instance where they have rendered services and made a report and made a bill, get paid for those services—the Railway Company pays. [105]

A. Dr. Willis.

Q. As a member of the N. P. B. A?

A. He is.

(Testimony of Mr. Benton.)

Q. When was he appointed?

A. A good many years ago. Paid him because the case was settled.

Q. And taken out of the settlement of the man that was injured? A. No.

Q. That is not a fact? A. No.

Q. What arrangement have you with the surgeons along the line for separate payment for treating strangers?

A. Don't know of any arrangement. It is the practice.

Q. You don't know that it is done in all cases?

A. I know what is done in my case and what I have observed other claim agents do.

The COURT.—The surgeons appointed by this association are under no obligations to treat strangers?

A. Not that I know of.

Q. Why do you take strangers to the company doctor if they show preference to other doctors?

A. We don't. [106]

Excerpts from Testimony of Dr. S. W. Mowers, for Defendant.

Direct Examination.

Q. When you were chief surgeon of the Northern Pacific Benevolent Association hospital at Tacoma, who hired you?

A. Northern Pacific Benevolent Association.

Q. Who paid you? A. Same association.

Q. Were you ever employed by the Northern Pa-

(Testimony of Dr. S. W. Movers.)

cific Railway in connection with that hospital?

A. No, sir.

Q. The employees under you at that time, who hired them? A. I did the hiring of them.

Q. Who paid them?

A. Northern Pacific Benevolent Association.

Cross-examination. [107]

Q. Do you know if the amount deducted from the employees and the Northern Pacific Ry. is sufficient to pay all expenses or insufficient—the amount plus what they get from the Railway Company?

A. More than sufficient just now.

Q. And if more than sufficient it is used toward building hospitals? A. Yes, sir.

(Witness excused.) [108]

United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court of
the Eastern District of Washington, Southern Division

CHAS. W. JOHNSON,
Attorney for Plaintiff in Error,
Pasco, Washington.

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vs.

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Corporation,**

Defendant in Error.

STATEMENT OF CASE

All the material facts for the determination of this case are either undisputed or proven by substantial evidence. In October, 1908, the plaintiff in error, whom we will hereinafter designate as the plaintiff, secured employment with the defendant in error, whom we will hereinafter designate as defendant. As a condition preceding the employment it was necessary for the plaintiff to sign an application for employment and agree to certain rules and regulations, which when signed by the applicant, was also signed by the train master in charge of the particular division on which employment was sought. Question 21 required the applicant to agree to become a member of the Northern Pacific Beneficial Association. This requirement, when answered in the affirmative and signed by both parties, constituted, according to the conception of the plaintiff, a contract respecting the things therein referred to, to-wit: That the plaintiff will allow certain deductions from his wages or pay to the defendant, Northern Pacific Railway Company, certain sums monthly, to be fixed by the

defendant, and be deducted by or paid to the defendant, in return for which the defendant renders medical aid and attention. For the purpose of rendering such aid and attention the defendant has organized the Northern Pacific Beneficial Association and the oral testimony, (undisputed), was that the principal officers and managers of the Northern Pacific Beneficial Association are also principal officers and managers of the defendant Northern Pacific Railway Company. After signing the application and agreement as before stated the plaintiff continued in the employment of the defendant without interruption until January 1913, when he became stricken with appendicitis and was taken by the defendant to a hospital at Tacoma, Washington, operated and maintained by the defendant, through the association known as the Northern Pacific Beneficial Association, referred to in the application for employment. The result of the treatment secured in this hospital is the cause of this action. The plaintiff alleged and proved that the operation as its inception was unsuccessful in that a stump of the appendix was allowed to remain, that hernia developed, infection set in and that employees of the defendant at this hospital absolutely failed and refused to properly dress the wound as good surgery would require and by reason of the negligence and omissions, and through the acts of the defendant, its officers and employees, the plaintiff became a physical wreck, in fact, has been assigned to a living death, for which he seeks to recover the sum of \$75,000.

Without further detailing the facts at this time, we will assign the error relied upon and proceed to argu-

ment. At the close of the testimony defendant moved for a direct verdict, the motion was granted and the jury was instructed to return a verdict for the defendant. (Record, p. 8). This is assigned as error. (Record p. 76).

ARGUMENT

There is an utter lack of harmony among the various state courts involving the question of liability presented by this appeal, the defendant relying upon the case of Union Pacific Railway Company vs. Artist, decided by the 8th Circuit Court of Appeals, back in 1894, (a Wyoming case) which holds in substance although the facts therein detailed vary somewhat from the facts in this case, that a hospital maintained by a railway company, not maintained for profit, is a charitable institution and the railway company is not liable, and the logic in applying the laws of charitable institutions to the facts in that case seems to the writer very lame indeed, the elements of charity being entirely lacking. We can, however, distinguish that case from the one at bar to some extent for the reason that in the case at bar there was, as plaintiff contends, a contract for medical aid and attention fully carried out by the plaintiff, and, further the defendant in this case did not voluntarily aid in establishing the hospital in question but did establish the hospital and through its own officers and agents conduct and operate the same. We quote with approval from the decision relied upon by the defendant, at page 367:

“If one contracts to treat a patient in a hospital—or out of it, for that matter—for any disease or injury, he undoubtedly becomes liable for any injury

suffered by the patient through the carelessness of the physicians or attendants he employs to carry out his contract. If one undertakes to treat such a patient for the purpose of making profit thereby, the law implies the contract to treat him carefully and skillfully, and holds him liable for the carelessness of the physicians and attendants he furnishes.”

We submit that the element of charity as defined in that case is wholly lacking in the case at bar. We also submit that the later and better authorities in identical cases do not follow the decision relied upon by the defendant.

We make the further contention that the law and decisions of the State of Washington shall be regarded as controlling in the case at bar.

“S. 1538. (R. S. '16 721.) Laws of the States: rules of decision. The laws of the several states, except where in Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. Act Sept. 24, 1789, c 20, No. 34, 1 Stat. 92.” (3 U. S. Comp. '16. Sec. 1538)

Peyton et al. vs. Desmond, 129 Federal, 1; Atlantic Coast Line Railway Co., vs. Farmer, 176 Federal, 692.

Before proceeding to argue the merits, we desire to establish further the fact that if there is evidence or reasonable inference from evidence sufficient to sustain a verdict, the trial court has no discretion in the matter,

cannot direct a verdict, but must submit the question to the jury.

“The motion for judgment notwithstanding the verdict invokes no element of discretion. It invokes the pure judicial functions of the trial court of this state on review. It can only be granted when the court can say, as a matter of law, that there is neither evidence nor reasonable inference from evidence sufficient to sustain the verdict.” (76 Wash., at page 674, *Brown vs. Walla Walla*, 670)

We also submit as a general proposition that the motion to direct a verdict should not have prevailed:

It should be the first care of the court to preserve the right of jury trial as guaranteed by the Federal Constitution to every litigant. So withdrawing a case from the jury by instructing a verdict should never be done, unless the causes as set forth above are indisputable present. So the following rules in passing upon a motion to instruct a verdict should control the court:

First. If the plaintiff has introduced evidence bearing materially on the issues, which would be sufficient, if uncontradicted, to sustain a verdict, then no amount of contradictory evidence would justify the court in taking the case from the jury and instructing a verdict. *Rockford v. Pennsylvania Co.* 98 C. C. A. 105, 174 Fed. 81.

Or Second. Where the evidence is of such a character that reasonable men would differ as to the conclusions to be drawn from it. *Louisville & N. R. Co. v. Roberts*, 101 C. C. A. 202, 177 Fed. 923, 924 and

cases cited; *Columbia Box & Lumber Co. v. Brown*, 84 C. C. A. 269, 156 Fed. 459.

Third. The mere fact that there is a preponderance of evidence on one side or the other, in favor of the party moving for a verdict, does not require the judge to take the case from the jury, even though it might justify a new trial because of the preponderance of evidence against the verdict. *Rockford v. Pennsylvania Co.* 98 C. C. A. 105, 174 Fed 81; *City & Suburban R. Co. v. Svedborg*, 194 U. S. 201, 48 L. ed. 935, 24 Sup. Ct. Rep. 656; *Mt. Adams & E. P. Inclined R. Co. vs. Lowery*, 20 C. C. A. 596, 43 U. S. App. 408, 74 Fed. 463; *Chicago, M. & St. P. R. Co. v. Anderson*, 94 C. C. A. 241, 168 Fed. 901.

The specifications of negligence in plaintiffs complaint which were proven are stated in subdivision 1, paragraph 2, as follows:

“The surgeon operating upon the plaintiff failed to remove all of the infected portion of the appendix, allowing a portion of such appendix to remain.”

(Record p. 2)

and paragraph 3, as follows:

“That thereafter, the surgeons in the hospitals aforesaid instructed the return of the bandage with the proper dressing for attention. That thereafter the attendants furnished by the defendant, failed and refused to properly dress the said wound once for a period of three to four days, and once for a period of five days, with the result that serious infection occurred.” (Record p. 3)

The plaintiff entered the services of the defendant in October, 1908, being employed by James Shannon, the train master. (Record p. 11) Contract of employment was signed by both parties and we quote question and answer No. 21..

“21. Do you understand that you are required to become a member of the Northern Pacific Beneficial Association upon entering the service of the Northern Pacific Railway, and do you assent to that Association’s rules and monthly deductions from your salary for this purpose?—Yes.”

“This application was made by **James Edward Carr**
(Sign your name in full, no initials.)

Located at Pasco, Washington

Date—10-26, 1908. (Record p. 14)

Witness: James Shannon.”

The material portions of the plaintiff’s testimony are quoted as follows:

“Mr. Johnson.—Q. After you went to work for the Northern Pacific in 1908 was anything paid by you to the Northern Pacific for medical aid and attention and surgical attention? A. It was taken out of my salary.

A. Why, I applied when I went to the hospital.

Q. Now then, when was that? A. That was in 1913.

Q. To whom did you make application?

A. I called the doctor in.

Q. What doctor did you call in?

A. Dr. H. M. Johnson at Toppenish..

Q. What condition were you in physically when you called Dr. Johnson in? A. I was sick.

Q. Who was Dr. Johnson at Toppenish?

(Testimony of James E. Carr)

A. A Northern Pacific doctor at Toppenish.. (Record p. 15)

Q. What did he say was your ailment?

A. He said appendicitis; remove the perforated appendix.

Q. Tell the jury as near as you can, what condition you found yourself in after the operation, that is with regard to your bandages or the care that you had received immediately after the operation.

A. Well, after the operation—they made two incisions on the table, on the operating table; one was about three inches long, and then there was a smaller one lower down with. And the one above was sewed up on the table, closed and held together with tape, and they used the lower one for a drain. (Record pp. 16-17.)

Q. You say that bandage or dressing was removed in about three weeks after the operation. Who removed that bandage?

A. Why, they changed internes the first of the month, and a new interne came in and removed it, took the tape off.

Q. Was the surgeon present when the tape was removed? A. Only this interne. (Record p. 17)

Q. Just the interne? A. The interne.

Q. Do you remember his name? A. Eisengraver.

Q. What did he do after he removed the bandage, if anything?

A. Why, I asked him to leave them on and he told me it wasn't necessary.

Q. What followed after he removed the tape?

(Testimony of James E. Carr)

A. Well that night, why, I rolled around there and the side busted open.

Q. The stitches let go? A. Let go..

Q. What was the condition of your side the next morning?

A. It was blood; the dressing was saturated with blood, and clothes.

Q. Did the chief surgeon or his assistant come in and see you?

A. The assistant surgeon came in in the morning making his rounds.

Q. What was his name? A. Dr. Argue.

Q. Did he examine you then?

A. I called his attention to it and he looked at it, that is, he didn't look at the wound; just turned the clothes over; he didn't look at it at the time.

Q. He didn't look at it at that time?

A. No, just looked at the dressing.

Q. Did you complain to him about your condition?

A. I told him it was tore loose and he says I must be mistaken, and I says, "No, I don't believe I am, I think she let go last night, I am all saturated." "Oh," he says, "I guess you are mistaken." I says, "No, I ain't, look," and I turned the bed clothes back, and he could see the blood and he left there.

Q. What followed after that?

A. He and the interne Eisengraver came back in.

Q. What happened when he and the interne, Dr. Eisengraver, came back in?

A. Well, Dr. Eisengraver started to dress it and Dr.

(Testimony of James E. Carr)

Argue stood at the foot of the bed, and Dr. Eisengraver was dressing the side and Argue stood back and saw the condition I was in, and he kind of shook his head, he didn't say nothing at the time. So finally Eisengraver was just about getting through when Argue spoke to him and says, "Better put them straps back on there; they ought to leave them on." So he put the dressing on and Argue walked out.

Q. You refer to the tape that had been on there prior to that time?

A. Prior to that time, yes.

Q. Was the tape put back on?

A. There was tape put back on, but there was dressing underneath.

Q. Different from what it had been originally?

A. Different from what had been in there.

Q. What, if anything more was said by either of the doctors there at that time?

A. Well, Dr. Eisengraver says, "You hadn't ought to complain like that on me," or words to that effect. "Well," I says, "I had to do something." (Record pp. 18-19)

Q. What did he say?

A. Why, he said that I hadn't ought to have called Dr. Argue's attention to it. I told him, "I think I ought to talk to somebody," I says.

A. Well, this interne, he took care of my side there, I think for about a week, changing the dressings and stuff like that. So then one day he didn't show up at all, or the next day he didn't show up. **So the third morning**

(Testimony of James E. Carr)

Dr. Argue came in the room, and I asked him how often my side needed attention, and he says, “Why, about once in twenty-four hours.” “Well,” I says, “this is pretty near three days now, and I haven’t had no dressing or attention on it.” “Well,” he says, “maybe it don’t need it.” I says, “You better look and see whether it does or not,” and I turned back the bedclothes and Argue started right out of the door then, and in came the interne with some dressing under his arm. He had his street clothes on, and he came in there complaining, “You are kicking all the time; you are kicking all the time.”

Q. Did Argue see the condition of your side before he went out?

A. He just saw the outside of the dressing and it was all saturated. (Record p. 20)

Q. And then the interne Eisengraver came back in, and what did he do?

A. He started to dress it, and he said I was complaining and kicking all the time. I asked him if he thought I was wrong in calling Dr. Argue’s attention to this. I says, “I got to get some attention,—”

Mr. Johnson.—Q. Go ahead Mr. Carr.

A. He says, “No use kicking like that all the time; that won’t get you nothing.” “Well,” I says, “I have got to have some attention.” So he dressed it that day. He wouldn’t answer me the first time—when he said I was kicking all the time I asked him—that was the second time—he says, “Maybe a little clean dressing wouldn’t hurt it.” So he fixed up my side and the next

(Testimony of James E. Carr)

morning he never showed up at all, nor the next morning he didn't show up. The third morning he didn't show up, and I got some dressing from the nurse to put in there, and I just tucked that underneath to soak up the stuff and puss; everything was running then, but I thought "What is the use of kicking; I am getting in awful bad?" And I wouldn't say nothing. So the next morning there was a fireman in there that was going into the dressing-room on a wheel-chair to get his attention in the dressing room, so I asked him when he came back from there, I says, "Did that doctor in there say anything about fixing me up?" He says, "Yes, he spoke about you; he has got you to take care of yet."

Mr. Johnson.—Q. Tell what took place, not what anyone not connected with the institution said. Tell what took place, what you did and what the attendants at the institution did.

A. Well, they didn't do nothing that day. That was the fourth day. And that afternoon I got into the wheel-chair that the fireman had, and I went looking for Dr. Mowers. I went down in the elevator from the third floor to the first floor and inquired of the girl in the office or lobby where Dr. Mowers was, and she said she thought he was around the building, I says, "Where is Dr. Argue?" She says, "He has gone down town." So I went around the building looking for Dr. Mowers. I didn't find him. I was in this wheel-chair all the time, wheeling myself around. So I came back to the office, and I says, "Where is Dr. Mowers, I can't find him?"

She says, "Maybe he went down town." I came out in

(Testimony of James E. Carr)

the corridor and I met Dr. Bell, and I asked him if he knew where the doctors was, and he says, "They both went down town." (Record 23) So I went back to my room. I saw there was no chance, so I went back to my room. The next morning Dr. Mowers came in and I asked him if he understood my condition. He says, "Yes." I says, "You mean to say, you understand my condition? I need some attention. **I went three days once without any dressing, and it is the fifth morning now the second time.**" I says, "**I am laying here rotting, and I have got to have a doctor.**" He says, "Do you want me, or Dr. Argue?" I says, "Either one suits me, as long as it is a doctor; I got to have some attention." So he says, "All right, I will look at your side myself this morning after I make my rounds." So I was still in the wheel chair and I wheeled out in the corridor and I met this Dr. Eisengraver, and he says to me, "Carr, as long as you are up come in the dressing-room and I will fix your side in there." And I wheeled the chair into the dressing-room myself, and he says, "Can you get up on the table?" I says, "No, I ain't going to try to get up on the table." He says, "What did you come in here for," and started getting mad. He says, "I will tell you what I think of you; you questioned my ability as a doctor." I says, "No, I never did; you are mistaken." He says, "Yes, you did." I says, "No, I didn't; you haven't given me the opportunity yet." He says, "What do you mean?" I says, "You ain't a doctor." So I went out of the room, and he went out of the room, and I met Dr. Mowers a short time afterwards and he

(Testimony of James E. Carr)

came up to me laughing, and he says, "What is the matter with you and Dr. Eisengraver?" I says, "Nothing, why?" "Oh," he says, "He just told me you stepped on his toes." I says, "That is as far as I could get in the condition I am now."

Q. How long did you remain at the hospital after that?

A. I remained up there close on to—I don't know just—close on to three months.

Q. What was the condition of the wound?

A. Oh, it kept discharging puss all the time.

Q. Was it discharging pus when you left there?

A. Yes, sir. (Record pp. 23-24)

Q. Just tell us what happened after you went home. Did you go back to work?

A. No. I called in Dr. Johnson to take care of it then. He changed the dressing every day. Sometimes I would be able to go down to the office and sometimes he would come up, and he would take care of it. Finally, he says to me, "You better go back to the hospital and get that cleared up; that ain't going to heal on you." I says, "They seem to think it is over there." He says, "It ain't going to heal up; you better go back to the hospital and see what they think of it."

A. I says, "They seem to think it isn't necessary, it is going to heal itself." Johnson says, "You go back and tell them they got to go in there." So I went back and I met Mowers and told him what Johnson says. "Oh," he says, "Now Carr, that will heal up." I was only there at the hospital about a day that time, and I came back to Johnson, and it went along the same all the

(Testimony of James E. Carr)

time after that.

Q. Where did you go from Toppenish?

A. To Pasco.

Q. Did you receive any treatment there from any company doctors (Record pp. 25-26.

A. Yes, sir; Dr. O'Brien and Dr. Driscoll.

Q. Who were they?

A. They were company doctors at Pasco.

Q. How long did Drs. O'Brien and Driscoll continue to treat you then in Pasco?

A. Oh, they have treated me off and on until 1919; well practically, O'Brien has been treating me since. (Record 26)

A. I just came from Rochester and they told me they wouldn't operate on me on account of my cough." He says, "That's funny," I says, "Yes; what's the matter with letting me stay around two or three weeks and cure up this cough, and then if you want to operate go to it?" I says, "What do you want to operate to-morrow for?" He says, "Well, I am going away tomorrow." I says, "Where are you going?" He says, "I am going to Haydon Lake." "Well," I says, "I believe I will try and get rid of this cough before I let anybody operate on me; in fact I want the fellow that operates on me to stay on the job until I am well." "Well, he says, "That's all I can do for you." He says, "That is disgusting." That is the words he says. I says, "Yes, I understand it is," I says, "It is worse than that." So he left the room and Argue fixed up my side and put the dressing on.

Q. Did you offer to stay there until you got over this

(Testimony of James E. Carr)

cough? A. I offered to stay there.

A. Oh, I think I left the next day or two after something like that.

Q. Where did you go? A. I went back to Pasco.

Q. Who treated you when you got back to Pasco?

A. I went to Drs. O'Brien and Driscoll. (Record (30-31))

Q. What is the condition of your side at this time?

A. It is discharging pus.

Q. Still discharging pus. What was your condition of health prior to this operation in 1913?

A. Considered pretty good--good. (Record 34)

Testimony of Dr. H. B. O'Brien:

Q. Dr. O'Brien, where do you live?

A. Pasco Washington.

Q. What is your business or profession?

A. Physician and surgeon.

Q. Were you ever employed by the Northern Pacific or the Northern Pacific Beneficial Association.

A. I was.

Q. And when was that? (Record 39)

Mr. Cannon---State which one.

Mr. Johnson--Q. Which one?

A. Well both of them, I think.

Q. When were you employed by them, Doctor?

A. From about 1908, October, to about 1919.

Q. Do you know Mr. Carr? A. I do. (Record 40)

Q. Have you examined him, or were you ever present when Dr. Mower made an examination of him in your office?

(Testimony of Dr. H. B. O'Brien)

A. Why, Dr. Mowers put him up on the table and examined the side. Carr was having a great deal of trouble at that time and wanted to know what he would do.

Q. Did Mowers say anything regarding his condition at that time?

A. He said he thought the condition would clear up all right; an operation wasn't necessary.

Q. Did you ever accompany Mr. Carr to the Mayo Hospital at Rochester? A. I did. (Record 41)

Q. What treatment did Mr. Carr receive at Rochester in 1918 when you were back there with him? (Record 42)

A. Well, that is the time Dr. Judd went in and removed a stump of the appendix.

Q. Well, if someone working on the Pasco Division became sick or injured who issued the orders.

A. Generally got them from the superintendent's office if there was a wreck or anything.

Q. Superintendent of what company?

A. Of the N. P. Railway. (Record 43)

Q. As surgeon of the company did you treat any one except employees of the company?

A. Yes, if anybody was injured in a wreck as a passenger we would take care of him. (Record 44)

Q. Calling your attention now to this state of facts: Assuming that Mr. Carr has been sent by the company to Tacoma for an operation for appendicitis; an operation was performed for appendicitis and after the operation, some three weeks afterward the wound failed to heal, and it has been bandaged with adhesive tape, and that bandage was removed and a rupture occurred, pus

(Testimony of Dr. H. B. O'Brien)

was discharged and dressing applied. Doctor, how often in your opinion would it be necessary to change those dressing's

A. It depends altogether on the amount of pus that was discharged. Of course, you dress it enough to keep it clean and dry. (Record 45)

Q. From your experience with such cases how often would you imagine that would be necessary?

A. Couple of times a day.

Q. In your opinion, would it be proper method of treatment to allow that wound to go undressed from three to five days?

A. It wouldn't be proper treatment. (Record 46)

Q. Doctor, if an operation had been performed for appendicitis and the wound failed to respond to the ordinary method of treatment and would fail to heal, what would that indicate to you as a surgeon?

A. Well, I would eventually look for some foreign substance or something that was down there to keep it from healing.

Q. In your opinion, would the failure to remove an infected portion of the appendix cause that condition?

A. It could cause it, yes. (Record 47)

Q. If an operation had been performed for appendicitis, the appendix were removed and a rupture occurred, what would be the proper method of treatment of that rupture?

A. If it was a clean wound I would wait a reasonable length of time and repair that rupture. (Record 48)

Q. What would be the result of failure to properly

(Testimony of Dr. H. B. O'Brien)

dress a wound that was discharging pus?

A. It would infect more tissue.

Q. What would be the result of that upon a man's physical condition?

A. Well, he would absorb the pus, if the dressings weren't changed, into his system.

Q. If he would absorb the pus as you have stated, how would that affect his system??

A. Well it would be a general weakened condition; weaken him physically. (Record 50)

Q. What is his present physical condition?

A. Well, he has got a hernia of that right side with a discharging sinus.

Q. Is this discharging sinus from the vicinity of the appendix? A. It is.

Q. Would such a discharging sinus be caused by the retention of an infection in this cavity in the vicinity of the appendix?

A. It would be caused from infected tissue there.

Q. At the present time can you say whether or not Mr. Carr is permanently disabled?

A. I believe he is, yes.

Q. In your opinion he is? A. Yes.

Deposition of Dr. E. S. Judd:

A. E. S. Judd, Rochester, Minnesota. Physician and surgeon.

Q. Do you know James E. Carr of Pasco, Washington, and if so, when did you first have occasion to meet him?

A. I first met J. E. Carr, 6-3-1915, I think. I recollect

(Deposition of Dr. E. S. Judd)

him, I do not know him except as a patient.

Q. Did you ever treat Mr. Carr in your capacity as a surgeon, and if so at what time or times and for what ailment? State fully as possible.

A. I operated upon him March 4, 1918 for a sinus in right iliac quadrant which was discharging pus. This sinus ran down to the ileocecal coil and old stump of the appendix. Apparently there was no definite communication with the intestinal tract at any point. This area of bowel was stitched over with plain catgut. The fistulous tract ran up behind the cecum into the muscles posteriorly, into a large pocket containing heavy granulated tissue. (Record 51)

Q. From your examination and treatment of Mr. Carr, what in your opinion was the probable cause of his condition? Please state fully and completely.

A. The discharging sinus for which we operated upon him came from the region of the appendix and may have come from retained infection in that region. It also came through the deep muscles of the back and may possibly have been tubercular in origin although no positive evidence of tuberculosis could be made out in the tissue removed at that time. (Record 52)

Testimony of Dr. J. F. Cropp:

Mr. Cannon.—I think I shall agree that he is a duly licensed physician and surgeon and is qualified.

The Court.—As an expert?

Mr. Cannon.—Yes.

The Court.—Proceed then.

Q. Dr. Cropp, do you know Mr. Carr, the plaintiff in

(Testimony of Dr. J. F. Cropp)

this case? A. I have met him once.

Q. When was that? A. Last Sunday, I think?

Q. Did you examine Mr. Carr at that time?

A. I examined him, not exhaustively.

Q. What condition did you find him in physically?

A. Well, I found him quite exhausted, somewhat emaciated, with what I would denominate multiple hernia of the abdomen around near the location of the appendix. (Record 54)

Q. Assuming, Doctor, that an operation for appendicitis had been performed and adhesive tape bandage had been applied to support the abdomen and that adhesive tape and bandage had been allowed to remain for a period of three weeks this bandage was removed and a rupture occurred the night the bandage was removed and excessive pus was discharged, and it was rupture as I stated, what would be the proper approved method of treating that rupture as soon as the rupture had been discovered? (Record 55)

Q.. Now assuming the same state of facts and assuming that the wound was not stitched or sutured after it had ruptured but dressing was applied would you consider that dressing that wound in a pus case, once in three and once in five days would be proper surgical treatment?

A. I think the general law in surgery would be to keep the wound as clean as possible; taking into consideration your patient and surrounding conditions, but whether that dressing would be once a day or twice in a day or once in three or four days depends on the condition of the wound.

(Testimony of Dr. J. F. Cropp)

Q. If it was an open wound and pus was escaping so that it saturated the bed clothes and escaped around the bandage, then would a dressing from first after a period of three days and then after a period of five days be a proper treatment or should dressing have been oftener in that case?

A. The case is a criterion to go by; the point I would add it would be to keep that wound clean and free from pus as possible. I mean now the abdominal wall into which the incision had been made.

Q. After an operation for a perforated appendix had been performed, according to approved methods of surgery, would there be any stump of an appendix remaining?

A. I can't imagine a case in which the usual method of inverting had been done there would be a stump; there might be a base, we invert the stump. (Record 56-57)

Q. You examined Mr. Carr you say about Sunday, and you found him emaciated; what, in your opinion, is the cause of his present incapacity, his present condition?

A. I did not go into this case exhaustively, I did not examine his lungs, liver, kidneys, etc. I only observed the field of operation and I took for granted that the long discharge from this wound, barring any other germ infection gave rise to the exhaustion. Barring any hidden and unknown infection that might be absorbed into the system that might also give rise to this condition, the discharge from this field and the history of the case that it had been discharging for a number of years, was sufficient to cause his exhausted condition.

(Testimony of Dr. J. F. Cropp)

Q. You examined the abdominal wall as it now exists there?

A. Found it was pretty well honey-combed. Areas in this immediate locality in which the fascia was absent—propably had been absorbed and allowed the intestines to protrude through these openings, produced what I would denominate as multiple hernia—numerous places through which the intestines forced its way through these holes the fascia absorbed.

Q. What effect would the retention of pus and the failure to keep the wound clean after operation have upon this abdominal wall?

A. The presence of pus is an evidence of destruction and thereby absorption of the retaining wall.

Q. Would that be responsible for a condition such as you found the abdominal wall of Mr. Carr in? (Record 58)

A. I don't know that any incision had been made outside of those—externally, and I took for granted from what I found that it was through absorption—the integrity of the wall had been acted upon by pressure and absorption. I only found the condition of multiple hernia.

Q. If a cure at this time could be effected of Mr. Carr's condition, what would be required to treat that fascia of the abdominal wound there from the standpoint of surgery?

A. The first thing I would do would make an effort to find the source from which this discharge of pus and granulating material was emanating and relieve

(Testimony of Dr. J. F. Cropp)

that by some counter drainage. If I succeeded in doing this, then I would, it seems to me, every case however is a law to itself, but just what I could see and know without further investigation, it would occur to me that probably transplantation of fascia upon this abdominal site would offer some hope of recovery, provided always the drainage, counter drainage was established so as not to produce the same condition that was produced prior. (Record 59)

Q. In any event would you wait six or seven years to do it?

A. Not with this report. (Record 61)

Testimony of John Hays:

Do you know Mr. Carr? A. I do.

Q. How long have you known him?

A. About nine or ten years.

Q. Did you know him prior to the operation he had that has been mentioned here? A. I did.

Q. What was the condition of his health before that?

A. I considered him a healthy man.

Q. About how much would he weigh?

A. I would judge probably 210 or 215 pounds. (Record 65)

Testimony of Mrs. Rice:

Q. Mrs. Rice, where do you live at the present time?

A. Pasco, Wash.

Q. What relation are you to Mr. Carr. A. His mother.

Q. What was his physical condition prior to 1913?

A. Considered in good condition always. (Record 65)

Testimony of William A. Laidlow:

Q. State your full name?

A. William A. Laidlow.

A. Secretary of the Northern Pacific Benevolent Association.

A. This report that you have offered here as Defendant's Exhibit "E", tells us that McKimberly was president. Who was Kimberly.

A. At that time he was Assistant to the President of the Northern Pacific Railway Company.

Q. It gives Geo. T. Slade as First Vice President. Who was he?

A. Second Vice-President in charge of the operation of the N. P. Ry. Co.

Q. What was W. G. Johnson at that time?

A. He was Comptroller of the N. P. Ry. Co.

Q. What profit do the employees get out of the treatment received by passengers?

A. The claim department pay at rates for attendance at that point.

Q. Do they pay the regular rates to the surgeon on the ground?

A. No, they pay it to the Benevolent Association.

Q. The surgeon does not get paid for taking care of those cases aside from his pay from the Benevolent Association? A. No.

Q. Is it or is it not a fact that all of the officers of the Northern Pacific Benevolent Association are officers of the Northern Pacific Railway Company?

A. At the time there were four of them.

Q. Who are they?

(Testimony of William A. Laidlow)

A. President, vice-president, comptroller and secretary-treasurer.

Q. For whom did you work prior to entering the service of the Northern Pacific Beneficial Association?

A. I was in the purchasing department of the N. P. Ry. Co.

Q. Assuming, now, that someone not an employee of the railway company, is injured in a wreck along the line, who takes care of that injured person?

A. The claim department.

Q. What doctor do they call?

A. Generally call the surgeon of the N. P. B. A.

Q. Then, where do they send him, if he needs hospital attention?

A. To the nearest hospital.

Q. Of the Northern Pacific Beneficial Association?

A. Any point where this man is injured he is generally taken care of and the claim department handles it.
(Record 66-67-68)

Testimony of A. M. Lee:

Q. You are district claim agent of the Northern Pacific Railway Company? A. I am.

Q. How long have you been such agent?

A. Since twenty-five years.

Q. You have to do, have you, with persons who are injured as passengers or pedestrians, and also the trainmen? A. Yes.

Q. How are they treated?

A. By the N. P. authorized surgeons. We have surgeons for the Northern Pacific Beneficial Association,

(Testimony of A. M. Lee)

and they are also authorized surgeons for the Northern Pacific Railway Co. (Record 70)

Testimony of Dr. O'Brien:

Q. Did you ever treat any strangers, not employees of the Northern Pacific Railway Company during the time you were surgeon for them?

A. Yes, a number that was injured along the line.

Q. Did you receive pay from the Northern Pacific Railway Company?

A. No, don't remember of ever receiving anything for them.

A. The pay you received from the Northern Pacific Beneficial Association covered all your activities?

A. Yes, sir. (Record 71-72)

PLAINTIFF'S EXHIBIT NO. 4

MEMBERSHIP

Section 1. The membership shall include all employees of the Northern Pacific Railway Company.

MEMBERSHIP DUES

Section 1. Members whose monthly salary is less than \$25.00 \$.25 per month.

Members whose monthly salary on earnings is \$25.00 or over to be assessed on a basis of one (1) per cent of their monthly earnings, with a minimum deduction of 50 cents and a maximum of \$3.00 monthly.

Section 8. The Treasurer of the Northern Pacific Railway shall be elected Treasurer of the Association, and shall set apart in a special fund all assessments and contributions received from officers and employees of the Railway Company; deposit same in such bank as the

Board of Managers may designate; hold, distribute and invest same under the direction of the Board of Managers.

Section 10. The Comptroller of the Northern Pacific Railway Company shall be elected Comptroller of the Association, and will audit all accounts and report to the Board of Managers at least once a year and as often as required by the Board. (Record 73)

Having reviewed the evidence, certain facts are convincingly proven, or at least sufficiently proven to become issues for the jury to determine.

First: There was a contractual relation between the parties to this suit for medical and hospital attention, the exact extent of it not being so material.

Second: The affairs of the Northern Pacific Beneficial Association were absolutely under the control of the defendant through its officers.

Third: The Northern Pacific Beneficial Association was not maintained exclusively for the benefit of the employees nor as a charity, but was maintained for the defendant, in that: it treated strangers brought to it by the claim agents of the defendant. This solely for the Benefit of the defendant, the only question being whether the Northern Pacific Beneficial Association did this for hire or at the expense of the employees. In either event, the arrangement as testified to, by the witnesses for the defense, constituted such an arrangement as would absolutely contradict the holding of the trial judge that the Northern Pacific Beneficial Association was a charitable institution.

While we have not quoted at length all of the provis-

ions and regulations of this organization, we find upon close analysis that the features are identical with the facts found in the case of *Phillips vs. St. Louis & S. F. R. Co.* Let us quote first from this decision:

“We have set out this evidence, perhaps, in more detail than should have been done; but the relationship between these two corporations is an important one, and not confined to this case alone. To our mind it is immaterial as to the true character of the hospital association as indicated by its charter provisions. It has, however, but few, if any, of the earmarks of a voluntary benevolent association. Nor are there any earmarks of a public charity. What is received is paid for by the recipients. Under the weight of authority it cannot be held to be a charitable institution. *Haggerty vs. St. Louis, K. & N. W. R. Co.* 100 Mo. App. 424, 74 S. W. 456; *Coe vs. Washington Mills*, 149 Mass. 543, 21 N. E. 966; *Brown v. La Societe Francaise*, 138 Cal. 475, 71 Pac. 516; *Miller v. Chicago B. & Q. R. Co.* (C. C.) 65 Fed. 305; *Texas & P. Coal Co. v. Connaughten*, 20 Tex. Civ. App. 642, 50 S. W. 173. So that the rule that exempts such institutions from liability, as announced in *Murtaugh v. St. Louis*, 44 Mo. 480, does not apply. Nor are institutions of the character of the one disclosed by the record exempted from liability by the mere employment of competent servants. They must go further and competently treat the patients received. In such case they occupy the position of ordinary physicians and surgeons and are bound by the same rules, which are too fam-

iliar for repetition here. If they undertake to furnish the treatment, not as a charity, they stand in no different light from the ordinary physician. But this question is really beside the issues in this case. No one can read this record without concluding that, if the thin corporate shell of the hospital association is broken, the yolk therein contained is the defedant. By rule 1 above quoted, defendant exempts certain mail carriers from assessment and excludes them from benefits. By rule 3, the heads of the departments and the foremen of the defendant are furnished with blank certificates, which they fill and issue to employees, entitled to receive benefits, and such heads of departments and foremen, the alter ego of defendant, thus decide who shall be treated by the hospital association. By rule 5, the defendant's chief suregon and general claim agent must be notified and, by rule 6, if the employee injured can be moved to the hospital, the chief surgeon and general claim agent must be notified. Why notify the general claim agent of defendant if the two corporations were separate and distinct entities in fact? ***** (Philips v. St. Louis & S. F. R. Co., 17 L. R. A. (N. S.) 1167 at 1175)

This case was decided in 1908 and the case upon which defendant relied was decided in 1894.

Continuing to quote from this decision, we find support for the proposition that the Northern Pacific Beneficial Association was merely the agent of the defendant in this case:

“But further showing that the hospital associa-

tion or its several surgeons, is but the alter ego of defendant, we have circular No. 35, *supra*, by which defendant says to all employees that they will be assessed to pay for this medical attention. No option is given the employee. By force of this rule, defendant says to an employee: "We will take so much of your monthly earnings, and in the event you are sick or hurt and in the judgment of the head of the departments and the foremen in our employ, you are entitled to medical treatment, we will furnish it to you through the hospital association." So that it becomes unnecessary in this case to break the extremely thin and attenuated corporate shell of the hospital association, and expose to open view the yolk therein contained. The hospital association, whether it in fact be a separate corporate entity or in fact the defendant itself, masquerading under an assumed name, is at least the agent and employee of the defendant to perform these particular services. The defendant pays its said agent \$500 annually and in addition it requires of its employees that they pay to it the remainder, and by it such sum is paid to the agent for these services. To say the least, this hospital association, together with all its surgeons and physicians, are but agents of defendant and made so by express words in rule 13, *supra*. The negligence of these agents is the negligence of the defendant. As said in the case of *Orcutt v. Century Bldg. Co.* 201 Mo. 424, 'L. R. A. (N. S.) 929, 99 S. W. 1062, the defendant holds the purse strings of the hospital association. Not a dol-

lar does it get save through defendant. Defendant pays for itself \$500, and the remainder is paid by the tribute which defendant levies upon its employees, which is collected and paid through defendant. The hospital system is a worthy one, and a well, taken, advance step; but under the record in this case, such hospital association is but the agent of the defendant.”*** (Phillips v. St. Louis & S. F. R. Co. 17 L. R. A. (N. S.) 1167 at 1175-1176)

“Under proper instructions, this cause should have been submitted to the jury, and the trial court erred in giving the peremptory instruction for the defendant.

The cause is reversed and remanded, to be proceeded with in accordance with these views.

All Concur. “ (Phillips v. St. Louis & S. F. R. Co. 17 L. R. A. (N. S.) 1178).

Coming then to the point that we are bound by the decision of our State courts we quote from the leading decision in point:

“The appellant had been in the employ of the respondent for some two and one-half years. During that time the respondent had deducted monthly from his wages certain fixed sums, based on the amount paid him, which it had retained and credited on its books to its hospital fund.*****

The only inference that can be drawn from this is that the court concluded on the second hearing that there was not sufficient evidence to justify a finding on the part of the jury that the company was conducting a hospital for the purpose of deriving a

profit therefrom, or that it had contracted to treat the injured employee for his injury. It is not authority for the broad proposition that an employer, where he maintains a hospital for profit, or contracts, for a consideration, to treat his sick and injured employees, is not liable for malpractice of the physician or surgeon he employs, notwithstanding he exercises due care in the selection of such physician or surgeon. On the contrary, the case as a whole is authority for the opposite contention; and if in this case the respondent did contract, for a consideration, to treat its employees for any injury they might receive while in its employ, it is liable for the malpractice of the surgeon employed to treat the appellant; and this question as we say, should have been submitted to the jury." (Sawdey v. Spokane Falls & N. Ry. Co., 349 at pp. 351-356-357, (30 Wash. 349)

We also quote from the leading text covering this subject: Wharton & Stille's Med. Juris 3, pp. 506-507:

"But in such case if the employer obligates himself in the contract of employment to furnish a competent and skilful physician, he is laible to employees injured by negligent treatment." *****

"And an employer maintaining a hospital for treatment of his employees, with moneys deducted from their salaries, who takes an injured employee to the hospital, and enters upon his treatment without informing him that his contract is limited, or claiming to be treating him gratuitously, is estopped to claim that the treatment was gratuitous, in order

to escape liability for malpractice of the physician employed.”

We are also supported by written opinions from other jurisdictions:

In *Haggerty v. St. Louis, K. & N. W. R. Co.* 100 Mo. App. 424, 74 S. W. 456, it was held that a railroad company could not escape liability for unskillful treatment of an employee by a surgeon employed by its relief department, upon the theory that such relief department was a charity, where employees desiring membership in the relief department had to agree that, in consideration of the amounts paid by the railroad for the maintenance of the relief department, the acceptance of benefits from said relief fund for injury or death should operate as a release and satisfaction of all claims for damages against said company. The court said: “In our judgment the relief department organized by the defendant company, in view of the regulations provided for its government cannot be classed as a charity without doing violence to every significance that word bears either in popular or legal usage. It is not a charity within the definition of Justice Gray, above quoted, because the fund administered is not a gift by the employees who make contributions; much less by the railroad company, which does not make any unless a deficit occurs. The fund is made up from sums contributed by members for their mutual benefit and is to be enjoyed by them if they suffer from sickness or accident. It is, in effect, a provision made by the employees to insure a stipend for them

to live on if they are disabled, and a benefit to their families if they die. In addition to this, if disabled by accident, their medical attendance is paid out of the fund. This strikes us as a purely business arrangement on the part of the employees of the railroad company. **But to call the enterprise a charity on the part of the company itself is extravagant, when we note that one of its purposes, as carved in high relief on the face of the regulations, is to prevent damage suits."**

In conclusion permit us to submit that Mr. Carr, the plaintiff, has been totally ruined and caused to suffer a living death through the negligence of the agents of the defendant, after his having contributed to their coffers for a number of years, not only to secure relief himself, but to aid them in maintaining their claim department with a direct profit to the defendant, and to call this charity and allow the defendant to escape the broad mantle of that term "charity" would be doing violence to established justice.

The cause should be reversed and remanded with instructions to submit the issue to a jury.

Respectfully submitted,

CHAS. W. JOHNSON,

Attorney for Plaintiff.

C

No. 3587

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth Circuit

JAMES E. CARR, *Plaintiff in Error*,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, *Defendant in Error*.

MOTION TO STRIKE TRANSCRIPT OF
RECORD AND TO DISMISS
WRIT OF ERROR.

FILED

FEB 11 1927

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MOTION TO STRIKE TRANSCRIPT OF
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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

CHAS. W. JOHNSON,

Pasco, Washington,

Attorney for Plaintiff in Error.

EDWARD J. CANNON,

FRANCIS J. McKEVITT,

Spokane, Washington,

Attorneys for Defendant in Error.

NOTICE:

To James E. Carr, Plaintiff in Error herein, and to Chas. W. Johnson, your attorney: You and each of you are hereby notified that the within motion to strike transcript of record and to dismiss writ of error will be filed with the Clerk of United States Circuit Court of Appeals for the Ninth Circuit with instructions to calendar the same for argument on the 23rd day of February, 1921, the day set for argument upon merits of the within entitled cause.

EDWARD J. CANNON,

FRANCIS J. McKEVITT,

Attorneys for Defendant in Error.

COMES NOW the Northern Pacific Railway Company, defendant in error, by its attorneys Edward J. Cannon and Francis J. McKevitt, and moves the Court to strike plaintiff in error's transcript of record and to dismiss the appeal of said plaintiff in error on the following grounds:

I.

Upon the ground and for the reason that plaintiff in error, plaintiff below, has not, nor has his attorney, in any manner complied with Rule 75 of the Rules of the District Court for the Eastern District of Washington, being the Rules for the Ninth Circuit Court of the United States, a copy of which Rule is attached hereto, marked Exhibit "A", and made a part of this motion.

II.

For the reason that a bill of exceptions has not been reduced to writing and settled and signed by the Judge at the time the ruling was made nor at any time subsequent during the trial, nor within such time as the Court or Judge might have allowed same by order made at any time during the trial, nor within the time hereinafter mentioned. Said plaintiff in error, plaintiff below, did not within ten days after the ruling of which he com-

plaintains was made, serve upon the adverse party, defendant in error herein, a draft of any proposed bill of exceptions. No exception pursuant to said rules was made or taken, nor was a concise statement of so much of the evidence or other matter as necessary to explain the exception and its relation to the case made, nor has any other act or thing been done under or pursuant to said Rule 75.

III.

For the reason that Rule 81 of said District Court and of said Ninth Circuit Court has not been in any manner complied with. No notice of motion as to the preparation of a bill of exceptions has been served or filed, nor has the Court or Judge by order made at any time extended the time for making the same, nor has said plaintiff in error, plaintiff below, or his counsel, in any manner complied with Rule 81, of which rule a duly certified copy is hereto attached, marked Exhibit "B", and made a part of this motion.

IV.

For the reason that heretofore and prior to the time of preparing plaintiff's pretended bill of exceptions or applying for a review of said cause, the time had long expired prior to file or make

plaintiff's petition for a writ of review, filed September 1, 1920.

V.

In furtherance of this motion of said defendant in error, said defendant in error attaches hereto and makes a part of this motion the order and memorandum of the Court, Hon. Frank H. Rudkin, presiding, dated the 21st day of September, 1920, a copy of which memorandum is hereto attached and made a part of this motion and marked Exhibit "C" herein.

VI.

Plaintiff in error, plaintiff below, has not in any manner complied with Rule II of this Court in that said plaintiff in error has not at all set out any part or portion, nor the substance of any of the evidence admitted or rejected, of which he claimed error in admitting or in rejecting.

VII.

For the reason that said plaintiff in error has not brought to the attention of the Court any of the evidence relating to the question whether or not the Northern Pacific Beneficial Association was acting as, or was, the agent of the Northern

Pacific Railway Company as set forth in No. 1 of the alleged assignments of error, on page 76 of the Transcript of Record. Said testimony and evidence is now printed and filed herein under order of the Judge of this Court, and is found on page of the additional record printed under such order.

VIII.

For the reason that said plaintiff in error has not brought to the attention of the Court any of the evidence relating to the question whether or not the Northern Pacific Beneficial Association was a charitable institution as set forth in No. 2 of the alleged assignments of error, on page 76, Transcript of Record.

IX.

For the reason that said plaintiff in error has not brought to the attention of the court any of the part of the Northern Pacific Railway or the Northern Pacific Beneficial Association, nor has he made a part of his transcript of record the admissions made in the trial that neither the defendant in error nor the Northern Pacific Beneficial Associa-

tion was in any manner negligent in the employment of the surgeons of the association or said surgeons assistants.

EDWARD J. CANNON,
FRANCIS J. McKEVITT,
Attorneys for Defendant in Error.

EXHIBIT "A".

RULE 75 of the CIRCUIT COURT OF THE
UNITED STATES FOR THE
NINTH CIRCUIT.

Rule 75: BILL OF EXCEPTIONS:

A bill of exceptions to any ruling may be reduced to writing and settled and signed by the Judge at the time the ruling is made, or at any subsequent time during the trial, if the ruling was made during a trial, or within such time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during a trial, by order made at any time during the trial, or within the time hereinafter mentioned, and when so signed shall be filed with the Clerk.

If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows:

The party desiring the bill shall within ten days after the ruling was made, or if such ruling was made during a trial, within ten days after the rendition of the verdict, or, if the case was tried without a jury within ten days after written notice of the rendition of the decision, serve upon the adverse party a draft of the proposed bill of exceptions. The exception must be accompanied with a concise statement of so much of the evidence or other matter as is necessary to explain the exception

and its relation to the case, and to show that the ruling tended to prejudice the rights of such party. Within ten days after such service, the adverse party may serve upon the proposing party proposed amendments to the proposed bill. Such proposed bill and the proposed amendments shall within five days thereafter, deliver said proposed bill and amendments to the Judge, who must thereupon designate a time at which he will settle the bill; and the clerk must, as soon as practicable, thereafter notify or inform both parties of the time so designated by the Judge. In settling the bill the Judge must see that it conforms to the truth, and that it is in proper form, notwithstanding that it may have been agreed to by the parties, or that no amendments may have been proposed to it, and must strike out of it all irrelevant, unnecessary, redundant, and scandalous matter. After the bill is settled, it must be engrossed by the party who proposed the bill, and the Judge must thereupon attach his certificate that the bill is a true bill of exceptions; and said bill must thereupon be filed with the clerk.

EXHIBIT "B".

RULE 81 of the CIRCUIT COURT OF THE UNITED STATES FOR THE NINTH CIRCUIT.

Rule 81: EXTENSIONS OF TIME:—

When an act to be done in any action at law or suit in equity which may at any time be pending in this Court, relates to the pleadings in the cause, or the undertakings or bonds to be filed, or the justification of sureties, or the preparation of bills of exceptions, or of amendments thereto, or to the giving of notices of motion, the time allowed by these rules may, unless otherwise specially provided, be extended by the Court or Judge by order made before the expiration of such time; but no such extension or extensions shall exceed thirty days in all, without the consent of the adverse party; nor shall any such extension be granted if time to do the act or take the proceeding has previously been extended for thirty days by stipulation of the adverse party; and any extension by previous stipulation or order shall be deducted from the thirty days provided for by this rule. It shall be the duty of every party, attorney, solicitor, or counsel, or other person applying to the Court or Judge for an extension of time under this rule, to disclose the existence of any and all extensions to do such act or take such proceeding which have previously been obtained from the Court or Judge in contravention of this rule shall be absolutely null and void, and may be disregarded by the adverse party. Nothing herein contained shall interfere with the power of the Court to extend the time to do an act or take a proceeding in any cause until after some event shall have happened or some step in the cause shall have been taken by the adverse party.

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE EAST-
ERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION.

Certificate.

I, W. H. HARE, Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, hereby certify that the above and foregoing Rules 75 and 81, as set out and marked, respectively, Exhibits "A" and "B", are, and have long been the rules of practice of this Court, adopted and promulgated by the United States Circuit Judges for the Ninth Circuit in the year 1904, and that they have not, nor has either of them, been in any manner abrogated, amended or changed from the day of their adoption and promulgation up to the present time.

(Seal)

WM. H. HARE,

Clerk,

By HARRY J. DUNHAM,

*Deputy Clerk, U. S. District Court, Eastern
District of Washington.*

EXHIBIT "C".

At the time of the allowance of the foregoing "Statement of Facts and Exceptions," the defendant appeared specially and objected to the jurisdiction of the Court to settle or allow a Bill of Exceptions at this time, upon the ground and for the Reason that the rules of this Court in that regard have not been observed or complied with. The rules of Court are, and for years have been, as set forth in the special appearance and these rules have not been followed or complied with in whole or in part. For this reason the jurisdiction of the Court to settle or allow a Bill of Exceptions at this late day is more than questionable; but the plaintiff has gone to the trouble and expense of preparing his record on appeal and earnestly insists that he is entitled to have the same settled and allowed.

I have, therefore, concluded to allow the Bill of Exceptions for what is it worth, submitting the same, and the question of jurisdiction, to the appellate Court for such action as it deems appropriate in the premises.

Dated this 21st day of September, 1920.

FRANK H. RUDKIN,

Judge.

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No. 3587

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth Circuit

JAMES E. CARR, *Plaintiff in Error*,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, *Defendant in Error*.

ERROR TO THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

FILED

FEB 18 1921

U. S. DISTRICT COURT

No. 3587

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth Circuit

JAMES E. CARR, *Plaintiff in Error*,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, *Defendant in Error*.

ERROR TO THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

CHAS. W. JOHNSON,

Pasco, Washington,

Attorney for Plaintiff in Error.

EDWARD J. CANNON,

FRANCIS J. McKEVITT,

Spokane, Washington,

Attorneys for Defendant in Error.

I.

MOTION OF DEFENDANT IN ERROR TO
STRIKE TRANSCRIPT OF RECORD AND
TO DISMISS WRIT OF ERROR.

The defendant in error can make no better statement than is made in Exhibit "C" by his Honor, Frank H. Rudkin, District Judge, page 14 of Motion to Strike. In support of said motion we cite—

Mound Coal Company vs. Jeffrey Manufacturing Company, 233 Fed., 913 at the point being discussed on pages 918 and 919.

That case and the decisions therein cited we deem conclusive.

Respectfully submitted,

E. J. CANNON,

FRANCIS J. McKEVITT,

Attorneys for Defendant in Error.

II.

ON THE MERITS.

STATEMENT.

(Numerals in brackets refer to pages of Transcript of Record.)

(Herein plaintiff in error will be designated plaintiff, and defendant in error, defendant.)

Not having received copy of brief of plaintiff we submit statement of facts.

This is a personal injury action brought by plaintiff against the Northern Pacific Railway Company, defendant, to recover damages which he claims to have suffered by reason of an operation for appendicitis performed upon him in January, 1913, by the Chief Surgeon of the Tacoma hospital of the Northern Pacific Beneficial Association. While employed as one of its conductors plaintiff was stricken with appendicitis and voluntarily went to the Northern Pacific Beneficial Association hospital (99) and was there operated upon. The result was unsatisfactory. It is not claimed that the defendant was negligent in any manner, nor is it claimed that the Beneficial Association was in any

manner negligent in the selection or employment of its surgeons. Neither was it claimed that these surgeons were incompetent, but only that they, or one of them, was negligent. (99, 100.)

Some thirty-eight years ago (66) the employes of the Northern Pacific Railway Company formed an association known as the Northern Pacific Beneficial Association, to which association each employe of the railway company paid each month a small percentage of his salary, depending upon his earnings (73). These monies are collected by the railway company and turned over to the Beneficial Association (66, 104). With the fund so raised a line of hospitals was built and equipped and a staff of surgeons employed and placed in charge who, in turn, appointed internes and nurses. As the number of employes of the railroad increased the funds increased and the hospitals were enlarged and extended. They are owned by the association and the defendant has no part in that ownership (66, 69, 101-107 inclusive). To manage the several hospitals the employes continue to elect, at an election had every year or two years, a man from each department of the railway service (97, 98). These men so elected constitute a board and they

select the officers of the association. The railway company derives no profit whatever from the association (103). On the other hand, it has contributed sums of money each year to make up deficiencies. At the present it contributes fifty thousand dollars per year (103). The manner of collecting the monies is as follows: The railway company deducts from the salaries of the employes, and Mr. Mayer, the Assistant Auditor of the Company, turns over to Mr. Laidlow, the Secretary of the Beneficial Association, a check for the monies so collected. This is done without charge (106).

The defendant in its answer to the plaintiff's complaint set forth these facts (page 2, answer) and contends that it is in no manner responsible for negligent acts, if any, of a surgeon of the Beneficial Association, or any of its employes, and therefore that, assuming a surgeon was negligent the railway company is not in any manner responsible for that negligence.

The alleged negligence occurred in January, 1913, and the action was begun more than six years afterwards. In the complaint it was alleged that the defendant's neglect continued to the year 1919, but

no evidence of such continuance was introduced, and that allegation was manifestly made to avoid the three-year statute of limitations, and being unable to show negligence of anyone, after the operation, attempt to prove continuing negligence was abandoned.

The case was tried, these facts duly proven, and a motion made at the close of the testimony that the court instruct the jury to return a verdict for the defendant, which motion was granted.

ARGUMENT.

Defendant contends as follows:

First: Even assuming that the hospitals in question were owned by the railway company and the surgeons appointed by that company, the defendant would not be liable if it exercised reasonable care in the selection of the surgeons, since defendant derived no profit from the maintenance of these hospitals.

Second: Since the hospitals of the association are maintained by the members for their mutual benefit in case of illness or incapacity, the fund which they each contribute is a trust fund which cannot be broken into by one to compensate him for

the alleged negligence of an employe who is his agent as well as the agent of his associates.

Third: Since it appears that the defendant herein is not one of the members of the association, has no voice in its management or in the selection of its officers, the defendant is not subject to the doctrine of *respondeat superior*.

We discuss these questions together.

Institutions of the character of the Northern Pacific Beneficial Association are numerous and of great benefit to their members. A small sum is each month contributed by each member which, with a great number of other like contributions, make up a sufficiently large sum to enable the contributors to build and equip great institutions. The fund created is a trust fund for the benefit of all. To allow one to directly divert this fund to compensate him for the tortious or negligent acts of the servants of the association is to thwart the intentions of the contributors.

5 *Am. & Eng. Encyc. of Law*, 2d Edition, 923.

The funds and property thus acquired are held in trust and cannot be diverted for the purpose of

paying damages for injuries caused by the negligent or wrongful act of its servants and employes to persons who are enjoying the benefit of the fund.

Parks vs. Northwestern University, 218 Ill., 381.

Surely if the association is not liable for the alleged negligence of its servants the railway is not liable for the acts of one whom it had no part in selecting. Indeed, it is well established that if the defendant employed this surgeon for the benefit of its men and without profit to itself it would not be liable for the malpractice or negligence of the surgeon, if it used reasonable care in his selection.

Engibritson vs. Tri State Cedar Co., 91 Wn., 297, page 283 and cases cited.

The rule is that those who furnish hospital accommodations and medical attention, not for the purpose of making profit thereby, but out of charity, or in the course of the administration of a charitable enterprise, are not liable for the malpractice of the physicians or the negligence of the attendants they employ, but are responsible only for their own ordinary care in selecting them.

Union Pacific R. R. Co. vs. Artist, 60 Fed., 365.

The above case seems to be exactly in point except that the Union Pacific Railroad Company maintains hospitals with funds of its employes entrusted to the company to administer. The defendant herein is further removed. Its men furnish the funds, elect their own officers and through such officers administer their own funds. The railway company has no part in the affairs of the association except to aid it by a contribution to the funds.

Circuit Judge Sanborn leaves nothing unsaid in his opinion, and we might well rest our case upon that decision alone. On pages 367, 368, 369 and 370 the subject is exhausted, and in the later case of—

Pearce vs. Union Pacific R. R. Co., 56
Fed., 44,

the rule is affirmed.

The Circuit Court of Appeals for the First Circuit in *Powers vs. Mass. Homeopathic Hospital*, 109 Fed., 294, delivers a masterly opinion wherein the question is gone into at great length. The reasons for the different decisions are set forth, and on page 298 the Court says:

“So far as known, there is no case which affirms the liability of the railroad under the circumstances stated.”

In that case the surgeon was employed directly by the defendant. Other cases so holding are:

Parks vs. Northwestern University, 75 N.E., 991 (Ill.);

Wells vs. Lumber Company, 57 Wn., 658;

Richardson vs. Carbon Hill Coal Co., 10 Wn., 648;

Symon vs. Hamilton Toggin, 76 Wn., 370;

Wharton vs. Warner, 75 Wn., 470-476.

Attempt is made by counsel for plaintiff to have the inference drawn that the railway in some manner profits by the establishment of these hospitals and the appointment of the surgeons. In this he has failed. The doctors of the association when they render any service in the treatment of strangers, are paid for those services by the railway (107, 108). If he had succeeded, however, the result must be the same. The association is entirely separate from the railway company, managed and controlled by the employes, who elect their officers by popular vote (104), in no way the agent or cre-

ature of the railroad. The doctrine of *respondeat superior* cannot be invoked in such a case. The application of the doctrine "Let the principal answer" has no bearing unless there exists in some form the relation of master and servant or principal and agent. The work carried on in these hospitals is for the benefit of all who contribute as members. Its work is theirs and its mistakes they must bear.

For these reasons, somewhat briefly stated, the judgment of the lower court should be affirmed.

Respectfully submitted,

E. J. CANNON,

FRANCIS J. McKEVITT,

Attorneys for Defendant in Error.

